No. 751

Office - Supreme Court, U. S.
FILED
FEB 7 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INC.

Respondent.

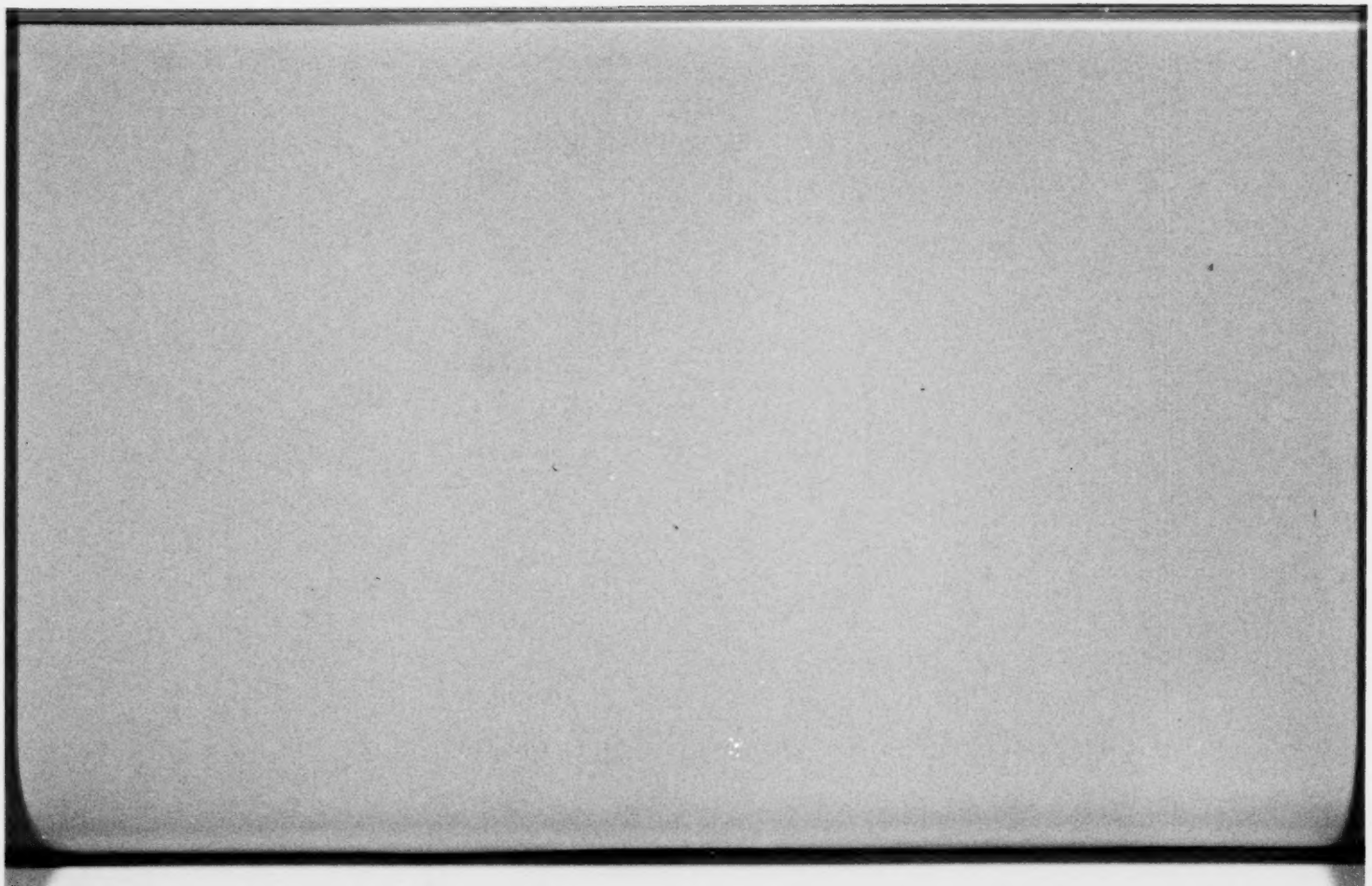
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

JOSEPH P. MCNAMARA,
Deputy Attorney General.

THOMAS M. QUINN, JR.,
Chief Counsel,
Unemployment Compensation Division.

RALPH E. ALLEN,
Attorney,
Unemployment Compensation Division.

CHARLES W. GRUBB,
Attorney,
Unemployment Compensation Division.
Of Counsel.



INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	3
Statement	4
Assignment of errors	6
Reasons for granting the writ	6
Conclusion	19

TABLE OF CASES CITED

	Page
Barrett v. *Indiana*, (1913) 229 U. S. 26	14
Carmichael v. *So. Coal & Coke Co.*, (1937) 301 U. S. 495	14
Euclid v. *Ambler Co.*, (1926) 272 U. S. 365	18
Florida Industrial Comm. v. *Gary-Lockhart Drug Co.* (Fla.) (1940), 196 So. 845	19
Gibson Products Co. v. *Murphy*, (1940) 186 Okla. 714, 100 P. (2d) 453	19
Helvering v. *Bullard*, (1938) 303 U. S. 297	16
Helvering v. *City Bank Farmers Trust Co.* (1935) 296 U. S. 85	16
Independent Gasoline Co. v. *Bur. Unemployment Comp. of Georgia*, (Ga.) (1940) 10 S. E. (2d) 58	6, 7
Maine Unemployment Comp. Comm. v. *Androscoggin, Jr., Inc.*, (Me.) (1940) 16 Atl. (2d) 252	19
Natural Gas Pipe Line Co. v. *Slattery*, (1937) 302 U. S. 300	16

Page

Rio Grande Western R. R. Co. v. *Stringham*, (1915) 239 U. S. 44 2

Rochester Tel. Corp. v. *United States*, (1939) 307 U. S. 125 16

Tyler v. *United States*, (1930) 281 U. S. 497 16

Unemployment Comp. Comm. v. *City Ice & Coal Co.*, (1939) 216 N. C. 6, 3 S. E. (2d) 290 19

United States v. *Whyel*, (1927) 19 Fed. (2d) 260 16

Virginia v. *Imperial Coal Sales Co.*, (1934) 293 U. S. 15 2

STATUTES

Section 237 (b) Judicial Code as amended 2

Indiana Unemployment Compensation Law, Sec. 52-1501 et seq. Burns' Ind. Stat. Anno. 1940 Supp 4

Alabama Unemployment Compensation Law, Act 447, Laws of Alabama 1935 14

Alabama Unemployment Compensation Law as amended, Act 497, Laws of Alabama 1939 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.———

INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The State of Indiana, by its counsel, prays that a writ of certiorari be issued to review the decree of the Supreme Court of Indiana entered in the above case December 17, 1940, reversing the decree of the Wabash Circuit Court of that State which overruled the demurrer of the plaintiff.

OPINIONS BELOW

The decree of the trial court is set forth in the Record (p. 9). The opinion of the Supreme Court of Indiana (R. 12) is not yet reported in the official State reports but is reported in 29 N. E. (2d) 776.

JURISDICTION

(a) The decree of the Supreme Court of Indiana was entered December 17, 1940 (R. 20). The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code as amended.

(b) The Supreme Court of Indiana held the application of Section 2 (g) (4) of the Indiana unemployment compensation law to the particular facts violative of the Fourteenth Amendment to the Constitution of the United States. The ruling of the Supreme Court of Indiana, therefore, brings the matter within the jurisdictional provisions relied upon.

Virginia v. *Imperial Coal Sales Co.* (1934), 293 U. S. 15.

(c) The decision of the Supreme Court of Indiana was predicated solely on a federal question and specifically holds that Section 2 (g) (4) is not violative of the Indiana Constitution.

(d) The decision of the Supreme Court of Indiana reversing the judgment of the trial court with directions is final since it disposes of the whole case on the merits, directs what judgment shall be entered and leaves nothing to the judicial discretion of the trial court.

Rio Grande Western R. Co. v. *Stringham* (1915), 239 U. S. 44.

QUESTIONS PRESENTED

Whether a provision of the Indiana unemployment compensation law (Acts 1939, Chapter 121, Sec. 2 (g) (4)), which provides for the taxation of small employing units not otherwise subject to such taxation, when said employing units are controlled with other units by the same interests, resulting in the aggregate employment control affecting eight or more persons, is valid within the purview of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, particularly where applied to two corporations, the majority of voting stock of each of which is owned by the same person.

Whether a State unemployment compensation law violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by providing that, for the purpose of determining whether an employer is subject to the act as employing eight or more individuals for twenty weeks, employing units under common ownership or control shall be treated as a single unit.

STATUTES INVOLVED

Employing units which[1] control the employment of eight or more persons are subject to the Indiana unemployment compensation law. The basic definition of the term employer, as that term is used in the Indiana unemployment compensation law, Acts 1936 (Spec. Sess.), chap-

[1] The term employing unit is defined as follows:

"Any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor to any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1935, has had in its employ one or more individuals performing services for it within this State. * * *" Sec. 2 (f) (1) of the law. [Burns Ann. Stat. 1940) 52-1502 (f) (1).]

ter 4, page 80 as amended by Acts, 1937, chapter 125, page 705; as amended by Acts, 1938 (Spec. Sess.), chapter 6, page 24; as amended by Acts, 1939, chapter 121, page 585 [Burns' Ann. Stat. (1940), 52-1501, et seq.], includes:

> "Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);" (Sec. 2 (g) (1) of the law) [Burns' Ann. Stat. (1940), 52-1502 (g) (1)].

Section 2 (g) (4) of the law [Burns' Ann. Stat. (1940), 52-1502 (g) (4)], includes in addition within the term employer:

> "Any employing unit which together with one or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;" (Sec. 2 (g) (4) of the law) [Burns' Ann. Stat. (1940), 52-1502 (g) (4)].

STATEMENT

This petition is the result of an action instituted by the respondent as plaintiff for the refund of unemployment compensation contributions alleged to have been improperly assessed by the defendant.

In its complaint (R. 1) respondent alleged that it was a corporation having its principal place of business in Indiana and that it never at any time had in excess of three individuals in its service. It also alleged that peti-

tioners had improperly charged or assessed contributions against it in the amount of $360.32 and it demanded payment therefor; that it had paid such amount under protest and has served the petitioners with a notice of its claim for refund but that no such refund was made. The petitioners in its answer (R. 4) made a general denial and in addition alleged that the respondent incurred the contribution liability as an employer under the Indiana unemployment compensation law because of its relationship to the Fairmount Lumber Company. The petitioner claimed that Bertha J. Coryell who since April 1937 was the owner of 60 out of 90 shares of the voting stock of the respondent lumber company was also, since that date, the owner of 185 out of 300 shares of the voting stock of the Fairmount Lumber Company, an Indiana corporation. Petitioners also alleged that the respondent corporation, together with the Fairmount Lumber Company had eight or more individuals in employment in each of twenty different weeks during the calendar year 1937 and 1938, all of which facts are undisputed. Petitioners claimed that the liability of the respondent lumber company for those years was thereby established under section 2 (g) (4) of the Indiana unemployment compensation law,[1] quoted above.

[1] The liability of the plaintiff lumber company for the calendar year 1939 was predicated on the provision of section 2 (g) (1) of the law quoted above whereby an employing unit having a stated experience during the current or the *preceding* calendar year is defined as an employer. The plaintiff lumber company's liability for the entire year 1937, instead of the period subsequent to April, 1937, was predicated upon the provision of section 3 (a) of the Indiana unemployment compensation law (R. 6), which provides:

"Any employing unit which is or becomes an employer subject to this Act within any calendar year shall be subject to this Act during the whole of such calendar year." (Sec. 3 (a) of the law.) [Burns Ann. Stat. (1940) 52-1503 (a).]

The applicability of these provisions was not controverted in the pleadings and was not considered in the opinions of the courts below.

The respondent demurred to these allegations (R 6) and contended that Section 2 (g) (4) of the Indiana unemployment compensation law was unconstitutional as violative of Section 1, Article 10 of the Constitution of the State of Indiana which provides for "a uniform and equal rate of assessment and taxation," the Thirteenth Amendment to the Constitution of the United Sttates, and the Fourteenth Amendment to the Constitution of the United States. The Wabash Circuit Court overruled the demurrer of the respondent (R 9). An appeal was taken to the Supreme Court of the State of Indiana where the decision of the lower court was reversed and Section 2 (g) (4) of the Indiana unemployment compensation law was declared valid under the Indiana constitution but unconstitutional as in violation of the equal protection clause to the Fourteenth Amendment to the Constitution of the United States.

A petition for a rehearing was denied by the Indiana Supreme Court on December 17, 1940, (R. 20) 29 N. E. (2d) 776.

ASSIGNMENT OF ERRORS

1. The Supreme Court of Indiana erred in failing to hold the classification involved in Section 2 (g) (4) of the Indiana unemployment compensation law constitutional, as a reasonable means of avoiding evasion of the provisions of the law.

2. The Supreme Court of Indiana erred in holding the effect of Section 2 (g) (4) to be one of unreasonable discrimination when in fact its purpose and effect is to avoid discrimination.

REASONS FOR GRANTING THE WRIT

1. Unlike the decision of the Supreme Court of Georgia in *Independent Gasoline Company* v. *Bureau of Unemployment Compensation of the State*

> *of Georgia,* — Ga. —, 10 S. E. (2d) 58, cert. denied, — U. S. — (November 25, 1940), the Supreme Court of Indiana specifically held that the Act did not violate the Indiana Constitution and based its decision solely upon the violation of the Fourteenth Amendment to the United States Constitution.

The federal constitutional issue here involved is identical to that presented in the case of *Independent Gasoline Company v. Bureau of Unemployment Compensation of the State of Georgia* (1940), 10 S. E. (2d) 58. When that case was before this court on petition for writ of certiorari it was urged that there was no independent non-federal ground for the decision of the Supreme Court of Georgia. This was predicated upon the specific reference to state constitutional provisions in the decision of the Supreme Court of the State of Georgia in that case. Apparently no satisfactory showing was made of the presence of an independent [redacted]-federal ground and it is assumed that this was the basis for this court's denial of the petition for writ of certiorari.

In the instant case, however, the Supreme Court of Indiana removed this case from the status of the *Independent Gasoline Company* case by holding that no provision of the Indiana Constitution had been violated. The only state constitutional ground urged by the respondent was an alleged violation of Article 10, Section 1, of the Constitution of Indiana. With respect to this provision the Supreme Court of Indiana said:

> "That taxes imposed by the Indiana Unemployment Compensation Law are excise and not property taxes. *Carmichael v. Southern Coal & Coke Co.* (1937), 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327; *Charles C. Stewart Mach. Co. v. Davis* (1937), 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1327. Section 1 of article 10 of the Constitution of Indiana, which provides

> for a uniform and equal rate of assessment and taxation and forbids exempting property except for specific purposes, applies only to property taxes under a general levy. *Miles v. Dept. of Treasury* (1935), 209 Ind. 172, 199 N. E. 372."

The court then proceeded to consider the constitutionality of the statute under the Fourteenth Amendment of the Federal Constitution and quoting at length from the opinion of the Supreme Court of Georgia in the *Independent Gasoline Company* case concluded that the application of the statute sought by the state would do violence to the appellant's constitutional rights. (R. 19.)

> 2. The importance of the question here presented and the probable harmful effects on the national system of unemployment compensation if the decision of the Indiana Supreme Court is allowed to stand.

We have stated above that we believe that the petition for writ of certiorari in the *Independent Gasoline* case was denied because of an independent non-federal ground for the state court's decision. If, however, this court had any doubt as to the importance of the substantive federal issue here involved we submit that the decision in this case would settle that question. The decision in the instant case was rendered while the petition for certiorari in the *Independent Gasoline* case was still pending before this court. The court will note that the Indiana court in dealing with the federal question presented, rests its decision almost entirely upon the decision of the Supreme Court of Georgia, and it indicated that it believed the Georgia decision to be a decisive precedent as to the meaning of the equal protection clause of the Federal Constitution. The importance of this petition is demonstrated by the consideration that the action of the Indiana court foreshadows the invalidation of statutory provisions

of this type in more than thirty states[1] which have adopted it.

[1] Alaska, sec. 2 (h) (4), Session Laws of Alaska 1937—Extraordinary Session, ch. 4; Arizona, sec. 19, Session Laws of Arizona 1936—First Special Session, ch. 13, amended by Session Laws 1937, ch. 68; Colorado, sec. 19 (f) (4), Laws of 1936—Third Extraordinary Session, ch. 2, amended by Laws 1937, ch. 260 (1935 Colorado Statutes Annotated, Vol. IV, ch. 167A, sec. 19 (f) (4)); Connecticut, sec. 804d, Public Acts 1936—Special Session, ch. 2; amended by Public Acts 1939, ch. 310 (the provision does not appear until the 1939 ch. 310 amendment); Delaware, sec. 2 (h) (4), Laws of Delaware—Ch. 258, amended by Laws 1939, ch. 196 (sec. 2 (h) is affected, but subsec. (4) remains the same); Florida, sec. 3 G IV, Acts of 1937—Ch. 18402 (Compiled General Laws of Florida, Permanent Supplement, Title XI, ch. CVII, sec. 4151 (490) G IV); Hawaii, sec. 2 (j) (4), Laws of Hawaii 1937—Act 243—(sec. 2 (j) (4) appears in Laws of 1939, Act 219, for first time); Illinois, sec. 2 (e) (5), Laws of 1937—S. B. 436, p. 571, amended by Laws 1939, S. B. 458, p. 571, in which sec. 2 (e) (5) was amended (originally was sec. 2 (e) (4)) (Smith-Hurd Illinois Annotated Statutes, ch. 48, sec. 218 (e) (5)); Iowa, sec. 19 (f) (4), Laws of 1936—Ch. 4, Extra Session, Laws of 1937, ch. 102; re-enacted the law, amended by Laws of 1939, ch. 68 (Code of Iowa 1939), ch. 77.2, sec. 1551, 25 F (4)); Louisiana, sec. 18 (f) (4), Laws of 1936, Act 97—Sec. 18 re-enacted by Laws 1938, Act 164, and Laws 1940, Act No. 16 (E. S.) (General Statutes 1939, sec. 4434.18 (f) (4)); Maine, sec. 19 (f) (4), Public Laws of 1935—First Special Session 1936, amended by P. L. 1937, ch. 228; Maryland, sec. 19 (f) (4), Laws of 1936—Extraordinary Session, ch. 1, amended by Laws 1937 (Special Session), ch. 2; Laws 1939, ch. 278, re-enacted sec. 19 (Annotated Code of Maryland, article 95 A, sec. 19 (f) (4); Michigan, sec. 41 (3), Public Acts of 1936—Extra Session, Act No. 1, amended by Public Acts 1937, Act No. 347; (Michigan Statutes Annotated, ch. 154b, sec. 17.543 (3)); Minnesota, sec. 2 (f) (4), Laws of Minnesota 1936—Extra Session, ch. 2; amended by Laws 1937, ch. 43, ch. 306; Laws of 1939, ch. 443 (Masons' Minnesota Statute, 1940 Supp., ch. 23 AA, sec. 4337-22 F (4)); Mississippi, sec. 19 (h) (4), Laws of Mississippi, 1936—ch. 176, amended by Laws 1938, ch. 147, amended by Laws 1940, ch. 295 (Mississippi Code—1938 Supplement, Sec. 2830.19 (h) (4); Missouri, sec. 3 (h) (4); Laws of Missouri, 1937, p. 574, amended by Laws 1939, p. 887 (Missouri Statutes Annotated, Vol. 7, Sec. 13194—3 (h) (4); Nebraska, sec. 2 (g) (4), Laws of Nebraska 1937, ch. 108, p. 370, amended by Laws 1939, ch. 56, p. 228 (Compiled Statutes of Nebraska 1939 Cumulative Supplement, Ch. 48-702 (g) (4); New Hampshire, sec. 1 (H) (5), Laws of New Hampshire, 1935, ch. 99, amended by Laws 1935, ch. 142; Laws 1937, ch. 178 re-enacts sec. 1 (sec. 1 (H) (5) appears for the first time); New Jersey, sec. 43:21-19 (h) (4), Acts of 1936, Special Session, ch. 270, amended by Laws 1938, ch. 312,

All of these states have deemed the common control provision in question to be essential to the fair and effective administration of their law. Yet if the decision of the Supreme Court of Indiana as to the meaning of the equal protection clause of the Federal Constitution is allowed to stand together with the decision of the Supreme Court of Georgia, the validity of the provision in the laws of the other states and the successful administration of the unemployment compensation programs of such states will be seriously endangered. Furthermore, the importance of

---

amended by Laws 1939, ch. 94 (Revised Statutes—Cumulative Supplement 1939, ch. 21, sec. 43:21-19 (h) (4)); New Mexico, sec. 19 (f) (4), Laws of New Mexico, 1936—Special Session, ch. 1, amended by Laws 1937, ch. 129, Laws of 1939, ch. 175 (1938 Supplement to New Mexico Statutes Annotated, sec. 156-319 (f) (4)); North Carolina, sec. 19 (f) (4), Public Laws of North Carolina, 1936—Extra Session, ch. 1 (North Carolina Code of 1939 Annotated, sec. 8052 (19) (f) (4)); North Dakota, sec. 2 (f) (4), Laws of North Dakota, 1937, ch. 232; amended by Laws 1939, ch. 215; Oklahoma, sec. 19 (f) (4), Session Laws of Oklahoma, 1936, Extra Session, ch. 1 (appears as ch. 52 in Session Laws 1936-37), amended by Laws 1939, ch. 52, p. 335 (Oklahoma Statutes Annotated, Title 40, sec. 229 (f) (4)); Rhode Island, sec. 3 (5) (a) (4), Public Laws of Rhode Island, 1936, ch. 2333 (sec. 3 (5) (a) (4) does not appear until 1937 amendment), amended by Laws 1937, ch. 2556, amended by Laws 1939, ch. 670 (General Laws of Rhode Island, 1938, ch. 284 (does not contain 1937 revision)); South Carolina, sec. 19 (f) (4), Acts of South Carolina, 1936—Act No. 946, amended by Laws 1939, Act No. 316, p. 487; South Dakota, sec. 19 (f) (4), Laws of 1936, Special Session, ch. 3 (South Dakota Code 1939, sec. 17.0802 (6) (d); Tennessee, sec. 19 (f) (4), Acts of Tennessee, 1936—Extra Session, ch. 1; amended by Laws 1937, ch. 128, secs. 87, 88 (Williams Tennessee Code Annotated, sec. 6901.19 (f) (4)); Texas, sec. 19 (f) (4), Acts of 1936—Third Called Session, ch. 482, amended by Acts 1937, ch. 67, amended by Acts 1939, p. 436 (Vernon's Revised Civil Statutes Annotated, Art. 5221b—17 (f) (4); Utah, sec. 19 (i) (4), Laws of Utah, 1936—Special Session, ch. 1, amended by Laws of 1937, ch. 43, amended by Laws of 1939, ch. 52, Utah Revised Statute Supplement 1939, sec. 42-2B-19 (i) (4); Virginia, sec. 2 (i) (4), Acts of 1936—Extra Session, ch. 1, amended by Laws of 1938, p. 1004, ch. 446, amended by Laws of 1940, p. 538, ch. 333 (1940 Cumulative Supplement to the Virginia Code of 1936 Annotated, sec. 1887 (94) (i) (4); Washington, sec. 19 (f) (4), Laws of Washington, 1937, ch. 162 (Remington's Revised Statutes of Washington, sec. 9998-119 (f) (4)).

the question suggested that it should be authoritatively resolved by this court.

The scheme of the Indiana unemployment compensation law and of most of the state unemployment compensation laws having this provision is as follows: In general the statute will be limited to employers of eight or more. However, the exemption of employers of seven or less is limited and not absolute. One of the limitations is that where two or more employing units under common ownership or control would, if grouped together, employ more than eight for the required period, they will be deemed to be covered.

The inclusion of the provision affecting this limitation results from a recognition that laws applicable to employers of eight or more can very easily be evaded by the simple procedure of splitting establishments or entities. In certain types of business, particularly those where labor costs represent a large part of the total expenses of operation, and where efficiency would not be materially impaired by the division into separate units, an employer might find it profitable to split his establishments into several smaller units, each employing less than eight employees.

A law having the broad social implications of unemployment compensation, cannot be administered successfully under circumstances permitting obvious evasion.

The decision of the Supreme Court of Indiana necessarily adjudicates that many workers who the legislature intended should be protected from the risks and hazards of unemployment are to be denied that protection. We cannot, of course, foretell with precision what the effect of this new decision will be. There are thousands of others employed by larger establishments which may well be split up in order to achieve the exemption which this decision affords. These employees have heretofore felt secure in the belief that when unemployed they will be entitled to

the benefits of the unemployment compensation law. The decision of the Indiana Supreme Court, unless reversed by this court, foretells a severe shock to them and a serious impairment of the efficacy of the nation-wide system of unemployment compensation.

The decision of the Supreme Court of Indiana will be harmful to employers as well as to employees. The major reason impelling the legislature to exclude small employers was the administrative inconvenience in collecting taxes from them and the burden of these taxes upon a small employer who did not share the economic advantages of large scale organization. *Carmichael v. Southern Coal & Coke Co.*, (1937) 301 U. S. 495, 511. Through section 2 (g) (4) the Indiana legislature has determined that in dealing with establishments which are owned or controlled by the same interests and which together employ more than eight employees, there are not the problems, difficulties and inconveniences which justify the exclusion of employers of less than eight. They might well and reasonably did believe that such establishments keep wage records, utilize bookkeeping and accounting services in common, and avail themselves of the increased profits which flow from large scale organization. In short, the reasons which justify the general exemption of employers of less than eight, are not, in fact, applicable to employers of less than eight whose establishments are owned or controlled by the same interests. Indeed, if the common ownership or control provision is stricken from the law, an employer of eight or more individuals will be the object of severe economic discrimination since competitors enjoying the same advantages of size of organization that he does, would be exempted by the fortuitous circumstances that they had divided their establishments.

3. The decision of the Supreme Court of Indiana is in conflict with numerous decisions of this court

and denies to the state legislature the power to classify the subject of taxation in accordance with the needs of the legislation at issue.

To assure uniform treatment of all employers and employees, similarly situated, the General Assembly saw fit to include not only individual employers of eight or more employees but also any group of small employing units which are owned or controlled by the same interests and which collectively employ eight or more workers. This is on the theory that it is the person or entity who or which controls the employment of eight or more employees that is to be reached and it is immaterial whether such control is exercised through majority stock ownership of corporations, as here, or otherwise. Employment of eight or more persons should be recognized even though the person exercising control of such employment masks behind two corporations. Equal protection is guaranteed to all persons subject to state legislation, who are similarly situated. It guarantees, however, only the protection enjoyed by other persons or classes in the same situation or under like circumstances. We do not believe that the statutory provision in question denies equal protection of the law. The state legislature is not prohibited by the constitution from discriminating among members of the same class provided the discrimination is not arbitrary, or oppressive, but has a definite public purpose. The class to which this provision applies consists of those who in any way control the employment of eight or more persons. Its purpose was to extend the coverage of unemployment compensation to all employees of large employer interests without regard to technicalities.

The act does classify persons who control the employment and unemployment of eight or more persons; and its application is uniform whether such control of the employ-

ment of eight or more is accomplished individually, through partnership agreements, through trusts, or, as in this appeal through corporations.

In the case of *Barrett v. Indiana,* (1913) 229 U. S. 26, 29, in discussing the reasonableness of a classification, the court said:

> "The legislature is permitted to make a reasonable classification, and before a court can interfere with the exercise of its judgment, it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

Section 2 (g) (4) applies to all within the class with equal force. All employing units are within the purview of the section and the legislature has not singled out corporations or any other particular class of employing units.

This court in upholding the constitutionality of the Alabama unemployment compensation law, *Carmichael v. Southern Coal & Coke Co.,* (1937) 301 U. S. 495, did not, in specific terms, treat with the provision of the Alabama law which was very similar to the provision of the Indiana unemployment compensation law.[1] The court did, however, treat with the basic classification of employers of eight or more and of other inclusions and exclusions of the law and confirmed the broad powers of the legislature to classify

[1] The provision of the Alabama law was as follows: "Where any person . . . either directly or through a holding company or otherwise has a majority control or ownership of otherwise separate business enterprises employing persons in the State, all such enterprises shall be treated as a single 'employer' for the purposes of this Act." (Sec. 2 (f), Alabama unemployment compensation law, Chapter 447, Laws of 1935 as amended. By amendments in 1939, however, following the decision in the *Carmichael* case, the Alabama unemployment law was changed so that it now no longer contains any provision comparable to that here at issue. Act No. 497, Laws of 1939, effective September 21, 1939.

employers in the interest of sound administrative practice. This court said:

> "* * * It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competence is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.
>
> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. *Citizens Telephone Co. v. Fuller,* 229 U. S. 322, 332; *Hatch v. Reardon,* 204 U. S. 152, 159; *New York v. Latrobe,* 279 U. S. 421, 428; *Aero Transit Co. v. Georgia Public Service Commission,* 295 U. S. 285, 289. Cf. *Florida Central & Peninsular R. Co. v. Reynolds,* 183 U. S. 471, 480; *Packer Corp. v. Utah,* 285 U. S. 105, 110, footnote 6. We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers." (301 U. S. 495, 510, 511).

As indicated above, the common control provision is part and parcel of the basic classification in cases of employers of eight or more.

(a) The common control provision is essential to prevent avoidance or evasion of the Unemployment Compensation Law.

The manner in which the unemployment compensation law could be avoided or evaded if this provision is stricken has been described above. Assuming the statute as a whole is valid, any provision reasonably designed to avoid possible evasion is justified. The avoidance of evasion has frequently been upheld as a basis for classification. See *Tyler v. United States,* (1930) 281 U. S. 497, 505; *Helvering v. Bullard,* (1938) 303 U. S. 297, 302; *Helvering v. City Bank Farmers Trust Co.,* (1935), 296 U. S. 85, 92; *Ruppert v. Caffey,* (1920), 251 U. S. 264, 282.

In the recent case of *Natural Gas Pipe Line Company v. Slattery,* (1937) 302 U. S. 300, 308, this court upholding as reasonable a statute which gave to the Illinois Commerce Commission jurisdiction over "affiliated interests" of a corporation, said:

> "Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

See also *Rochester Tel. Corp. v. United States,* (1939) 307 U. S. 125, 145.

The Federal Income Tax Laws have for a long time had a provision which requires related corporations to submit consolidated returns. In *United States v. Whyel,* 19 F. (2d) 260, 262, (1927), the court specifically upheld this provision. In that case the *Whyel Coal Company* and the *Why-*

el Coke Company were separate corporations. Two brothers owned 94 per cent of the coal company stock and 99 per cent of the coke company stock. The United States Government required consolidated income tax returns to be filed on the theory that the corporations were affiliated within the meaning of the federal statute which provides as follows:

> "For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."
>
> Section 240 (b) of the Revenue Act of 1918.

Note that the Congress used the same device in this statute to prevent evasion as that used by the General Assembly of Indiana in the provision in question. The distinction between the federal statute, which confines the application to corporations in which substantially all the stock is owned or controlled by the same interests, and the Indiana statute is merely one of degree. Attention is also called to the fact that the language, "owned or controlled by the same interests," is identical with that of the Indiana statute. It is also to be noted that even under the federal provision there must be a minority bloc of stockholders to be considered. In this case the court said:

> "* * * The clear purpose of the act as to affiliation was to safeguard the interests of the government against the possible loss of revenue which would result from the evasion of the excess profits tax, through manipulation and shifting of profits, as between two or more closely associated corporations, where there was actual or potential unity of control of corporate affairs * * *"

> "* * * It is claimed that it is not within the power of Congress to impose a tax on one tax payer computed upon another tax payer's income. It will be observed that in this suit the total tax is computed as a unit, based upon the total net income of the affiliated corporations; then the assessments are made against the respective corporations in such proportions as they may agree upon, or, in the absence of such agreement, on the basis of the net income properly assigned to each, where unity of control exists. Congress certainly has power to enact legislation so as to prevent manipulating or shifting profits in order to avoid taxation."

A holding that the legislature may not consider the common control of employers for the purpose of determining coverage under the unemployment compensation law in effect constitutes an encouragement to employers to split their establishments, wherever possible into groups employing seven or less.

The fact that some innocent parties come within the purview of such provision is not material if the classification is otherwise reasonable. The provision injects no element of fraud or good faith into the picture. That such classification will in some instances make innocent employers liable may well be foreseen. Presumably, where the separate establishments are engaged in different types of business it may well be urged that no reason to evade could be reasonably found. This however, would not affect the validity of the provision in question. *Euclid v. Ambler Co.*, (1926) 272 U. S. 365.

(b) The common control provision represents an effort on the part of the legislature to remove discrimination which otherwise would exist.

It has been pointed out above that the common control provision in question is essential if economic discrimination among different employers is to be avoided. In imposing a tax liability based upon pay rolls, the legislature

should avoid giving one business establishment a competitive advantage over another. In drawing a distinction between large and small employers, it was recognized as signicant that the larger employer enjoys certain advantages of large scale organization which are not available to the small employer. But when a large employer splits his establishment into several smaller units, he does not lose these advantages; he continues to compete with the employer who has not split his functions. The legislature in its desire to avoid any discrimination of this type qualified the exemption of the small employers so as to equalize the burden of taxation on all employers similarly situated.

The basic test of the constitutionality of any legislative classification is its reasonableness in the light of the purposes of the law. One of the objectives of the common control provision is to remove whatever discriminatory consequences might have ensued from an unqualified exclusion of employers of seven or less. This alone should justify the legislative effort to avoid unjustified discrimination.

It should be noted that provisions almost identical to the one here in question have been given judicial recognition in other states by the highest courts of such states. *Unemployment Compensation Commission v. City Ice & Coal Co.* (1939), 216 N. C. 6, 3 S. E. (2d) 290; *Gibson Products Co. v. Murphy* (1940), 186 Okla. 714, 100 P. (2d) 453; *Florida Industrial Commission v. Gary-Lockhart Drug Co.* (1940), — Fla. —, 196 So. 845; *Maine Unemployment Compensation Commission v. Androsocoggin, Jr., Inc.*, et al. (1940), — Me. —, 16 Atl. (2d) 252.

CONCLUSION

The decision of the Indiana court in the instant case, particularly in view of its relationship to the decision of the Georgia Supreme Court in the *Independent Gasoline*

case threatens to remove an invaluable prop to the administration of the national system of unemployment insurance. It is essential that this court give guidance to state courts, and correct the erroneous belief that the provision here at issue is unconstitutional under the provisions of the Federal Constitution.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued as of and under the seal of this Honorable Court, directed to the Supreme Court of Indiana, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 27429, Benner-Coryell Lumber, Company, Inc., Appellant, v. Indiana Unemployment Compensation Board, Appellee," and that said judgment of the Supreme Court of Indiana may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet ~~and~~ and just; and your petitioner will ever pray.

Joseph P. McNamara,
Deputy Attorney General.

Thomas M. Quinn, Jr.,
Chief Counsel,
Unemployment Compensation
Division.

Ralph E. Allen,
Attorney,
Unemployment Compensation
Division.

Charles W. Grubb,
Attorney,
Unemployment Compensation
Division.

FILED
FEB 24 1941
CHARLES ELMORE CROPLEY
CLERK

No. 751

IN THE

Supreme Court of The United States

OCTOBER TERM, 1940

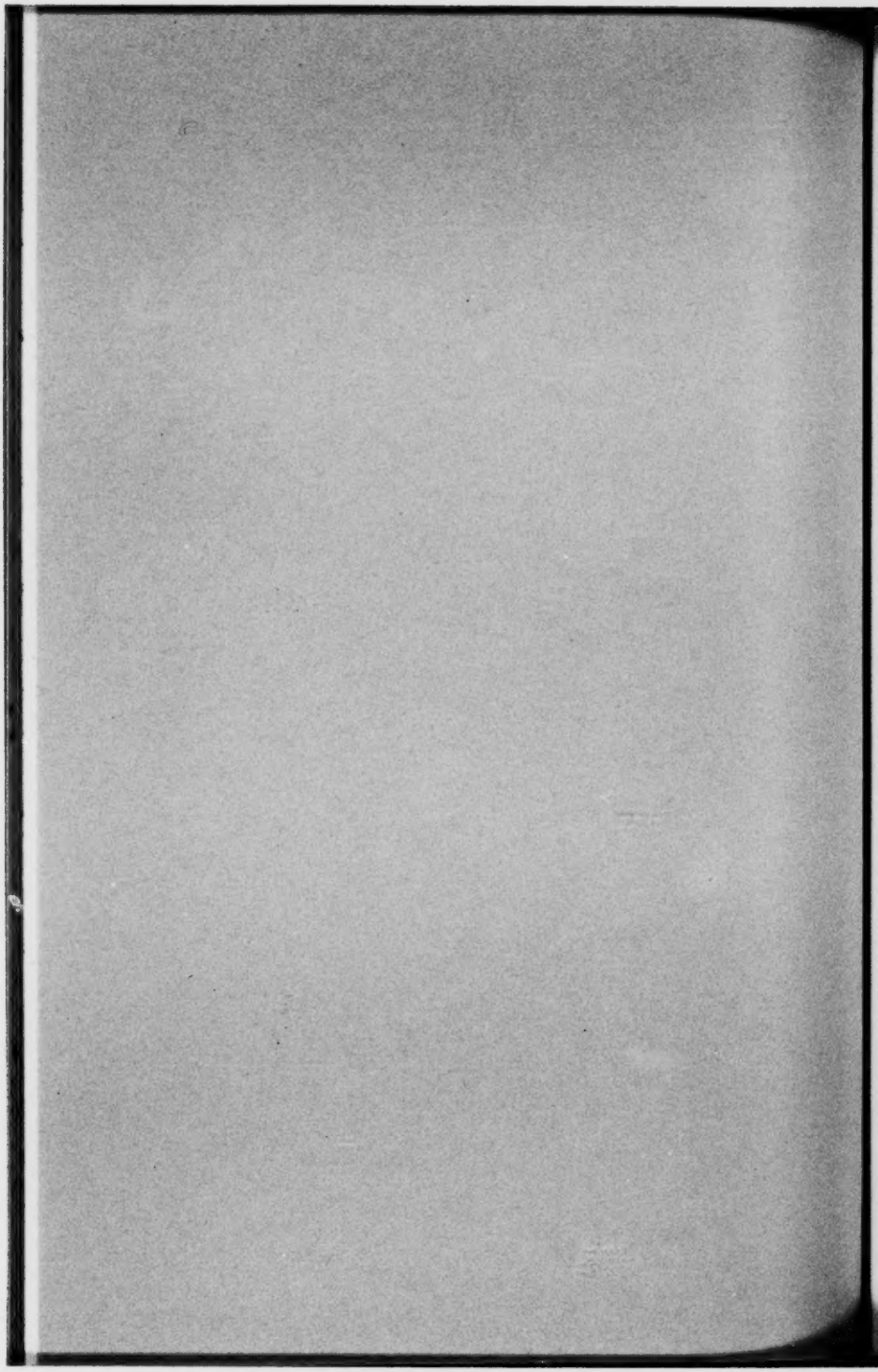
INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner,
vs.
BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

No. 751

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

JOHN R. BROWNE,
JOHN O. CAMPBELL,
ROBERT A. GEMMILL,
JOHN R. BROWNE, JR.,
Counsel for Respondent.

PEERLESS PRINTING CORPORATION, MARION, INDIANA



INDEX

	Page
Respondent's Statement of Matter Involved	2
Respondent's Summary Statement obviating alleged grounds for Certiorari	2, 3
Respondent's Argument, Point A	3
Excerpts from Opinion below showing the decision of a non-federal question	3 to 11
Petitioner's Points 2 and 3 obviated	11, 12

TABLE OF CASES CITED

	Page
Independent Gasoline Co. v. Bureau of U. Compensation (1940), ____ Ga. ____, 10 S. E. (2d) 58, 59, ____ U. S. ____, 85 L. ed. 124	5, 6
Adams v. Russell, 229 U. S. 353	10, 11
Bohler v. Callaway, 267 U. S. 479, 489	10
Chanler v. Kelsey, 205 U. S. 466, 467	10
Chicago G. W. Ry. Co. v. Kendall, 266 U. S. 94, 97-98	10
Farson v. Bird, 248, U. S. 268	10
Johnson v. Risk, 137 U. S. 300	11
Missouri, ex rel, v. North, et al, 271 U. S. 40, 41	10
Moffitt v. Kelley, 218 U. S. 400	10
New York Central R. Co. v. New York, 186 U. S. 269	10
Nichol v. Cole, 256 U. S. 222, 225	10
People, ex rel, Doyle v. Atwell, 261 U. S. 590	10
Petrie v. Nampa, etc., Dist., 248 U. S. 154	10
Risty, et al. v. Chicago R. I. & Pac. Ry. Co., 270 U. S. 378, 387	10, 11

INDEX

	Page
Southern P. Co. v. Schuyler, 227 U. S. 601	10
Saltonstall v. Saltonstall, Trustee, 276 U. S. 260, 270	10, 11
Stebbins vs. Riley, 268 U. S. 137	10, 11
Town of South Ottawa v. Perkins, 94 U. S. 260	11
United States v. Knott, 298 U. S. 544	11
Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 112	10
2 Cyc. of Fed. Proc., Sec. 404, p. 459	11
5 Cyc. of Fed Proc., Sec. 2665, p. 1044	11

IN THE

Supreme Court of The United States

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner,

vs.

BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

No. 751

Brief of Respondent in Opposition to Petition for a Writ of Certiorari

---

To the Honorable Charles Evans Hughes,
Chief Justice of the United States,
and Associate Justices of the Supreme
Court of the United States:

The respondent respectfully shows:

I.

Summary Statement of the Matter Involved

Respondent insists that the decision of the Indiana Supreme Court in this cause was predicated primarily upon said court's interpretation of Section 2, (g), (4), of the Indiana Unemployment Compensation Act as applied to the pertinent facts recited in said decision.

The constitutionality of said statute was referred to only incidentally in next to the last paragraph of said decision.

If it may be said that both federal and non-federal questions were decided by the Indiana Supreme Court, certiorari will not lie because,

(a) It does not appear affirmatively from the record that the decision of the federal question was necessary to a determination of the cause;

(See printed transcript of record, pp. 12 to 19, both inclusive.)

(b) The decision of the Indiana Supreme Court is an interpretation of a state statute as applied to the pertinent facts in the cause;

(See printed transcript of record, pp. 12 to 19, supra.)

(c) The federal courts will follow the decisions of state courts upon questions relating to the interpretation of state statutes.

See Argument, infra.

ARGUMENT

Point A

Respondent insists that the decision of the Indiana Supreme Court in this cause was predicated, primarily, on that court's construction and interpretation of Section 2, (g), (4), of the Indiana Unemployment Compensation Act, as applied to the facts recited by the court in its decision.

(See printed transcript of record, pp. 12 to 19, both inclusive.)

The Indiana Supreme Court stated the facts as follows:

"The appellant is an Indiana corporation, with its office and principal place of business in the town of LaFontaine, Wabash County. It is engaged in the retail lumber business and employs less than eight persons. Its capital stock is represented by 90 shares, 60 of which are owned by Bertha J. Coryell. Said Bertha J. Coryell also owns 185 out of 300 shares of the common stock of the Fairmount Lumber Company, a domestic corporation engaged in the lumber business at Fairmount, in Grant

County, and which likewise employs less than eight persons. Together, said corporations employ more than eight persons. The minority stockholders of the respective corporations are not the same persons. The state assessed unemployment compensation taxes against the appellant, which it paid under protest. It then brought this suit for a refund. The state answered, reciting the above facts; the appellant demurred to the answer; the trial court overruled the demurrer; the appellant refused to plead further; and judgment was rendered in favor of the state. The error relied on is presented by the ruling on said demurrer."

Then, among other matters, the Indiana Supreme Court stated this Respondent's position to be as follows:

"It is to be noted that no elements of fraud or intentional tax evasion are involved in this case, nor is there any showing of joint management of the two corporations or any other relationship between them beyond the fact that Bertha J. Coryell owns a controlling interest in the common stock of each. It is urged that to hold the statute valid as it is sought to be applied here, would unjustly penalize minority stockholders of corporations, who have no control over the transfer of stock not held by them, and are therefore powerless to prevent a majority of such stock from gravitating into the hands of one person who may at the same time own, or thereafter acquire, a controlling interest in another corporation, thereby subjecting, indi-

rectly, said minority holders to the burden of taxes not imposed upon corporations otherwise situated."

Thereupon, the Indiana Supreme Court said:

"The question which we are called upon to answer is therefore reduced to this: Do the owners of a majority of the stock of a corporation have such control thereof as to make their ownership or control the basis of classification for the purpose of imposing excise taxes on such corporations in the manner prescribed by the act under consideration?"

The Indiana Supreme Court then discussed certain instances wherein the ownership of corporate stock is recognized as a proper basis of classification for excise tax purposes and, after citing cases to support that proposition, the court continued as follows:

"None of the above cases considered the subject of discrimination against a corporation where the imposition of a tax was dependent upon the ownership of a mere controlling interest of its stock. The only case that we have found where the precise question here presented was before a court of last resort is Independent Gasoline Co. v. Bureau of U. Compensation (1940), ____ Ga. ____, 10 S. E. (2d) 58, 59."

Then, the Indiana Supreme Court quoted at length from Independent Gasoline Co. v. Bureau of U. Compen-

sation (1940), _____Ga. _____, 10 S. E. (2d) 58, 59, in which this court denied certiorari on November 25, 1940, _____ U. S. _____, 85 L. ed. 124.

Thereupon, the Indiana Supreme Court concluded its interpretation of said statute by holding that it was not applicable to the facts involved in this cause, and stated its reasons in support of such conclusion, as follows:

> "As has already been observed, the law regards a corporation as a distinct entity. This status is unaffected by the fact that a majority of its stock may or may not be controlled by the same interests. It may also be assumed for the present inquiry, that excise taxes of the character defined by the Unemployment Compensation Law may be imposed upon corporations; that corporations may be classified for that purpose; and that the amount of such taxes to be exacted may be determined by payroll expenditures. It is likewise true that as artificial persons, corporations must enjoy liberty of action to determine for themselves whether they will engage or continue in enterprises that would render them subject to this tax, and they should be in a position to know or ascertain whether such liability exists. Over the sale and transfer of its stock, a corporation ordinarily has no control. Transactions relating to the sale of capital issues may be negotiated privately or through independent marketing agencies, and the responsible officers of a corporation may not be advised as to the ownership of its shares until the certificates therefor are

presented for transfer. The stock of a particular corporation may be so distributed that the controlling majority thereof may change ownership at frequent intervals. In practical operation, situations may arise where the majority of the voting stock may or may not be in the hands of the same interests many times between annual meetings of the stockholders, or even between the tax paying periods. Under such circumstances, uncertainty and confusion would be inevitable and a continuity of policy impossible. For these reasons, it seems impossible to justify the interpretation sought by the state, upon the theory that the holders of a majority of the stock have control thereof because it is within their power to dictate who the directors shall be.

"The feature of the law which apparently undertakes to impose liability for these taxes on a corporation employing less than eight persons because the owner of a majority of its stock has a like interest in another corporation similarly situated, is likewise indefensible. As was pointed out in the concurring opinion of the Georgia case, from which we have quoted, this construction would permit corporations remotely located and engaged in business as dissimilar as those for which corporations may be formed, to be arbitrarily and fictitiously considered together for the purpose of imposing this tax. We do not believe that the General Assembly intended the provision of the act to be so applied, and if it did, we would be obliged to hold

it void. Legislatures have a wide latitude in setting up classifications in taxing statutes, but such classifications must always be reasonable and bear a rational relationship to the subject-matters with which they deal. Board, etc., v. Johnson (1909), 173 Ind. 76, 89 N. E. 590.

"It should be kept in mind that the term 'employing unit,' as used in the statute, is broad enough to include individuals and co-partnerships, as well as corporations. In some instances, it may also embrace trustees, personal representatives of estates, and receivers. For an example as to how the act may operate under the state's theory, a corporation with only three employees may be rendered liable for the tax because 51 per cent of its voting stock is owned by a person who also owns a private business with six employees, or two such businesses with three employees each. Thus the corporation, in the case of the illustration, is forced into the situation of a taxpayer, without regard to its competitive relationship to other corporations engaged in the same business and having the same number of employees. Its legal entity, which the law is supposed to respect, is thereby grievously discriminated against. The clause, 'controlled directly or indirectly by the same interests,' must therefore be carefully scrutinized and considered to ascertain its true meaning and significance. There is authority for the proposition that the holders of a majority of the voting stock of a corporation have control thereof, but to control may

> also have a restricted meaning, depending upon the circumstances under which the language is employed. Thus, in City of Chicago v. Dorband (1938), 297 I11. App. 617, 18 N. E. (2d) 107, the word 'control,' as used in an ordinance, was construed as being synonymous with 'ownership.' Regardless of the shades of meaning that may be attributed to the word, we are convinced that in the interpretation of the act before us, control of a corporation must be regarded as something more than that remote control that arises out of the fact that a majority of the holders of its voting stock may dictate who its directors shall be."

It will be observed that, thus far, the Indiana Supreme Court, interpreted Section 2, (g), (4), of the Indiana Unemployment Compensation Act as not being applicable to the facts in this case. Hence, it would appear that the controlling and primary feature of the Indiana Supreme Court's decision was one of statutory construction and interpretation.

True, the Indiana Supreme Court, at the end of its decision, did observe "that the construction and application of the statute sought by the state" would do violence to respondent's constitutional rights, but it did not intimate what constitutional rights would be thus violated. Respondent insists that, by its said decision, the Indiana Supreme Court decided primarily a question indigenous to Indiana statutory law.

Before certiorari will be granted, it must be made to appear affirmatively that not only a federal question was pre-

sented but that its decision was necessary to a determination of the cause. And where the decision rendered rested upon independent or non-federal grounds such as the interpretation of a state statute as applied to the pertinent facts, certiorari will be denied.

New York Central R. Co. v. New York, 186 U. S. 269;
Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 112;
Southern P. Co. v. Schuyler, 227 U. S. 601;
Adams v. Russell, 229 U. S. 353;
Farson v. Bird, 248 U. S. 268;
Petrie v. Nampa, etc., Dist., 248 U. S. 154;
People, ex rel, Doyle v. Atwell, 261 U. S. 590.

Where the decision of the State court rests upon a construction and application of a state law, the Supreme Court of the United States will not pass upon the constitutional questions raised.

Chanler v. Kelsey, 205, U. S. 466, 467;
Moffiitt v. Kelley, 218 U. S. 400;
Nichol v. Cole, 256 U. S. 222, 225;
Chicago, G. W. Ry. Co. v. Kendall, 266 U. S. 94, 97-98;
Bohler v. Callaway, 267 U. S. 479, 489;
Stebbins v. Riley, 268 U. S. 137;
Risty, et al, v. Chicago R. I. & Pac. Ry. Co., 270 U. S. 378, 387;
Missouri, ex rel, v. North, et al, 271 U. S. 40, 41;

Saltonstall v. Saltonstall, Trustee,
276 U. S. 260, 270.

"The decisions of the State courts are followed on the question of what are the laws of the state, * * * their construction," etc.

2 Cyc. of Fed. Proc., Sec. 404, p. 459;
5 Cyc. of Fed. Proc., Sec. 2665, p. 1044;
Town of South Ottawa v. Perkins, 94 U. S. 260;
Stebbins v. Riley, 268 U. S. 137;
Risty v. Chicago R. I. & Pac. Ry. Co.
270 U. S. 378;
United States v. Knott, 298 U. S. 544.

It was not necessary for the Indiana Supreme Court to rule on the constitutionality of the statute under consideration, because by its decision, it had interpreted said statute as not being applicable to the facts involved in this action. Hence, under such circumstances, certiorari will be denied.

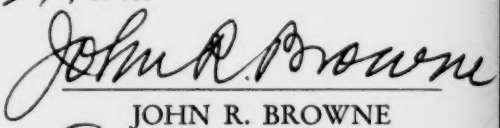
Johnson v. Risk, 137 U. S. 300;
Adams v. Russel, 229 U. S. 353.

Point B

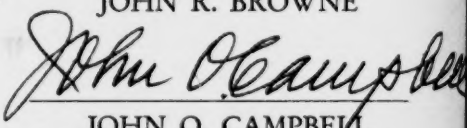
Since a non-federal question was decided by the Indiana Supreme Court, as shown in Point I and in Point A of the Argument hereinbefore set out, petitioner is not entitled to a writ of certiorari on the 2nd and 3rd points set out on pages 8 and 12 of its brief and the argument supporting the same.

It is, therefore, respectfully submitted that this cause is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari herein should be denied.

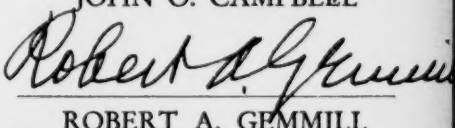
Dated February 21, 1941.



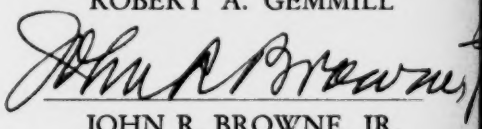
JOHN R. BROWNE



JOHN O. CAMPBELL



ROBERT A. GEMMILL



JOHN R. BROWNE, JR.

Counsel for Respondent.

FILED
FEB 27 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD

Petitioner

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED

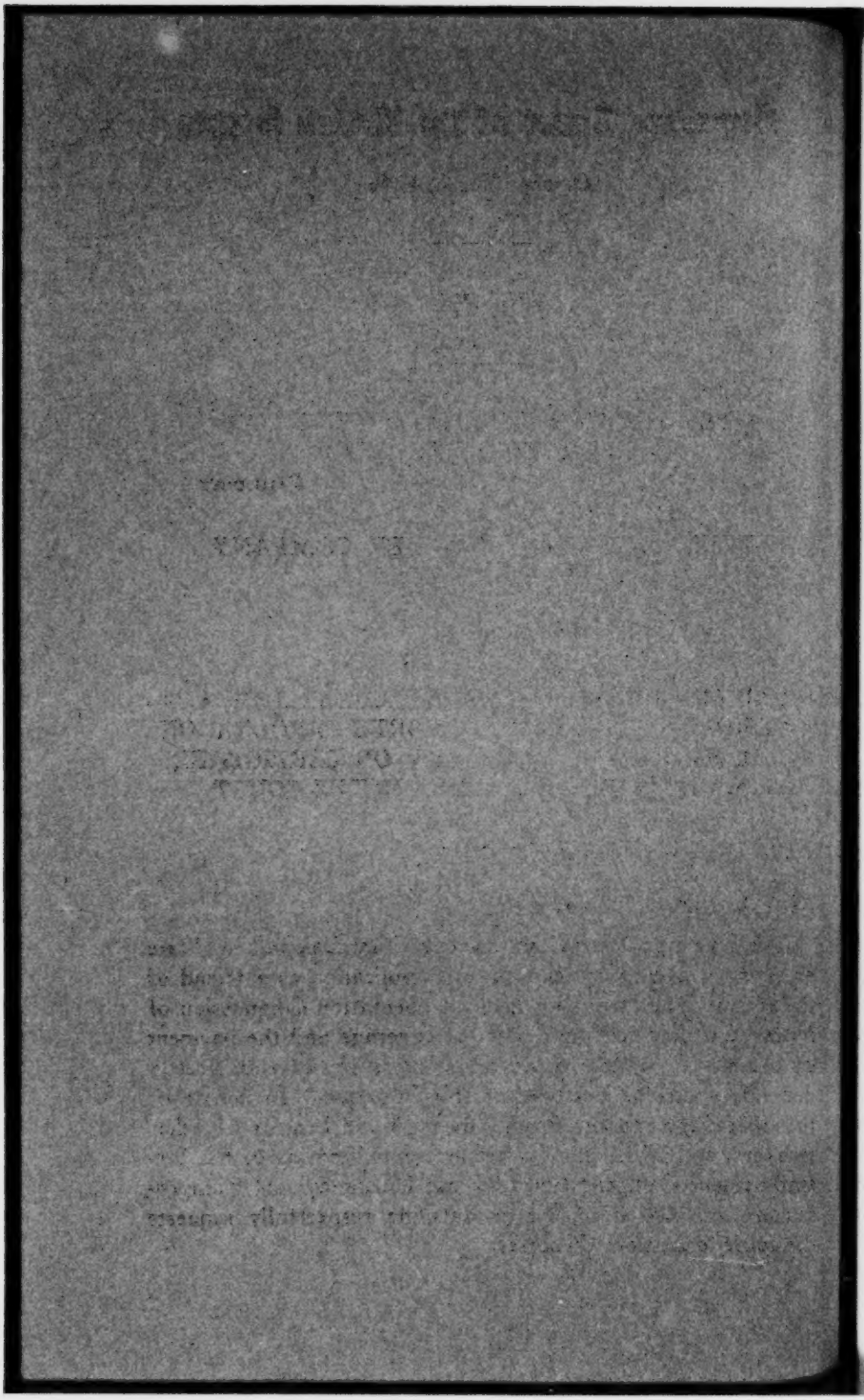
BRIEF FOR UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF NORTH CAROLINA ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT

HARRY MCMULLAN,
Attorney-General of North Carolina.

ADRIAN J. NEWTON,
Chief Counsel, Unemployment Compensation Commission of North Carolina.

RALPH MOODY,
Senior Attorney, Unemployment Compensation Commission of North Carolina.

W. D. HOLOMAN,
Senior Attorney, Unemployment Compensation Commission of North Carolina.



Supreme Court of the United States

October Term, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD

Petitioner

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED

BRIEF FOR UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF NORTH CAROLINA ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT

MAY IT PLEASE THE COURT:

The Unemployment Compensation Commission of the State of North Carolina appears on this application as a friend of the court. The Unemployment Compensation Commission of North Carolina considers that the coverage and the payment of benefits to several thousand workers vitally and directly depends upon the outcome of this litigation. In behalf of these workers and the future coverage and benefits of other workers, and in behalf of a proper administration of the Unemployment Compensation Law the Unemployment Compensation Commission of North Carolina respectfully requests the court to consider this brief.

The Unemployment Compensation Law of North Carolina contains the following section:

> "Employer means:
>
> * * * * * * * * *
>
> "Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection";

North Carolina, Sec. 19 (f) (4), Public Laws of North Carolina, 1936—Extra Session, ch. 1 (North Carolina Code of 1939 Annotated, Sec. 8052 (19) (f) (4));

The court will observe that this provision of the North Carolina Law is very similar to that of the Indiana Unemployment Compensation Law. In the administration of unemployment compensation laws this and similar provisions are usually referred to as "affiliation" or "common control" provisions or sections.

We approve and endorse the legal positions and authorities presented and relied upon in the petition and brief submitted by the Indiana Unemployment Compensation Board. For this reason we do not again discuss these points but wish to call the court's attention to the importance of this cause with reference to the practical administration of the Unemployment Compensation Law of North Carolina.

The experience of the Unemployment Compensation Commission of North Carolina has demonstrated that the provision in question is an essential and almost indispensable instrument for a practical, fair, and efficient administration of our Act. The ordinary type of employer under the Unemployment Compensation Law of North Carolina is the employing unit that has had in employment eight or more individuals for twenty different weeks in a calendar year. This line of demarcation between liability and nonliability was estab-

lished and this classification was made for the convenience of small business units; this relieving of small business units of unnecessary burden also has resulted in some convenience to the Unemployment Compensation Commission of North Carolina in furnishing forms, solving procedural questions and the general problems of administration. It is, therefore, easy to see that unless our agency is provided with a valid "common control" provision there will be a great tendency for business units now in operation to break down their units into distinct establishments with some feature of affiliation and thus evade the tax; new business units in perfecting their business forms do and will arrange their organizations into separate affiliated establishments for purposes of avoiding the tax.

The Supreme Court of North Carolina early recognized the importance of and gave judicial approval to our "common control" provision in the case of *Unemployment Compensation Commission v. City Ice & Coal Co.* (1939), 216 N. C. 6, 3 S. E. (2d) 290; as a result our agency has provided unemployment benefits for a great number of otherwise ineligible workers; if this provision is invalidated the law can easily be evaded, many workers will lose their protection under the Act and the unemployment compensation system designed to furnish a measure of security against the hazard of unemployment will be sabotaged by ingenious legal improvisations or by astute business technique. Our experience all goes to show that there is much attempted evasion of the unemployment compensation law and our agency has had to rely heavily on this provision.

We further submit that such a provision tends to equalize the competitive situation which would otherwise result where one large scale business broke itself into establishments to avoid the tax as opposed to another large scale business that operated within the law; such a provision guarantees that business units in the same general classification shall be treated alike, and prevents too sharp a classification in terms of the number of individuals employed, that is, eight or more.

Much uncertainty has resulted by reason of the fact that the Supreme Courts of some states have upheld the validity

of "common control" provisions while on the other hand the Supreme Court of Georgia in the case of *Independent Gasoline Company v. Bureau of Unemployment Compensation of Georgia*, __Ga., __ 10 S. E. (2d) 58, cert. den. __ U. S. __, 61 S. Ct. 175, and the Supreme Court of Indiana in the present case have rendered decisions to the effect that "common control" provisions are unconstitutional and invalid. The constitutional validity of such provision is now in serious doubt and employers operating separate establishments under common control are now questioning as to whether they are liable. Some of these have paid taxes and are demanding refund, and some are refusing to pay currently due contributions. The status of covered workers under this provision is in doubt and there are many serious questions as to whether payment of benefits should be continued under such a situation.

This state is, therefore, faced with the enormous problem of litigation upon the question of the constitutionality of the "common control" provision in its own unemployment compensation law. For this reason the State of North Carolina has filed this statement and respectfully requests this Court to take jurisdiction and grant the petition of the Indiana agency to the end that an authoritative decision may be given concerning the constitutionality of the "common control" provision and to the end that the Unemployment Compensation agencies of the nation may proceed with their administrative functions unimpeded and unhindered by litigation on this question.

HARRY MCMULLAN,
Attorney-General of North Carolina.
ADRIAN J. NEWTON,
Chief Counsel, Unemployment Compensation Commission of North Carolina.
RALPH MOODY,
Senior Attorney, Unemployment Compensation Commission of North Carolina.
W. D. HOLOMAN,
Senior Attorney, Unemployment Compensation Commission of North Carolina.

FILED
MAR 1 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

versus

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,

Respondent.

BRIEF ON BEHALF OF PHILIP J. CHARLET, ADMINISTRATOR OF THE DIVISION OF EMPLOYMENT SECURITY OF THE DEPARTMENT OF LABOR OF THE STATE OF LOUISIANA, SUBMITTED BY THE ATTORNEY GENERAL OF LOUISIANA AS AMICUS CURIAE.

THOS. J. MORAN'S SONS
BATON ROUGE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

versus

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,

Respondent.

BRIEF ON BEHALF OF PHILIP J. CHARLET, ADMINISTRATOR OF THE DIVISION OF EMPLOYMENT SECURITY OF THE DEPARTMENT OF LABOR OF THE STATE OF LOUISIANA, SUBMITTED BY THE ATTORNEY GENERAL OF LOUISIANA AS AMICUS CURIAE.

May It Please the Court:

The Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, through the Attorney General of Louisiana appears herein as a friend of the Court because of the doubt

which has been cast upon the validity of an important provision of the Louisiana Unemployment Compensation Law *(Section 18 (f) (4) of Act 97 of 1936, as amended by Act 164 of 1938, Act 16 of the First Extraordinary Session of 1940 and Act 11 of the Regular Session of 1940)* by the decision of the Supreme Court of the State of Indiana declaring unconstitutional a similar provision of the Indiana law.

The section of the Louisiana Statute above referred to reads as follows:

> "Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interest, or which owns or controls (by legally enforceable means or otherwise) one or more other employing units, and which if treated as though a single unit with such other employing units or interest, or both, would be an employer under paragraph (1) of this subsection;"

The Louisiana Unemployment Compensation Law, is designed to relieve small business concerns of the burden of taxation in aid of the unemployed; *Section 18 (f)(4)* commonly known as the *"common control"* provision of the Act prevents larger concerns, well able to pay the tax and intended to be reached by the statute, from evading

the payment of this beneficent tax by a division of establishments.

That the provision is fair and equitable, certainly cannot be denied. It sees that the burden of taxation is placed on those able to pay; it treats alike all businesses in the same general classification, and it avoids the unfair situation of large business concerns being treated differently because one may devise some feasible plan to divide its establishments while the other may not find it feasible to do so.

Litigation is now pending in the courts of Louisiana involving the *"common control"* provision of our statute and the decision of the Indiana Supreme Court and a similar decision of the Georgia Supreme Court in the case of *Independent Gasoline Company,* vs. *Bureau of Unemployment Compensation of Georgia, 10 S. E. (2d) 58,* certiorari denied, *61 S. Ct. 175,* will induce much additional litigation and create a serious problem of enforcement in this State.

Under the circumstances, it is the hope of the department charged with the administration of the Louisiana Unemployment Compensation Law that the Court will take jurisdiction of the Indiana case so that an authorita-

tive decision may be rendered concerning the constitutionality of the provision of the law in question and thus permit Louisiana's program of unemployment compensation to be carried out unimpeded by dilatory litigation.

Respectfully submitted,

EUGENE STANLEY,
Attorney General of
the State of Louisiana.

Office - Supreme Court, U. S.
FILED
FEB 20 1941
CHARLES ELMORE CROPLEY
CLERK

NO. 751

In the Supreme Court of the United States

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner,

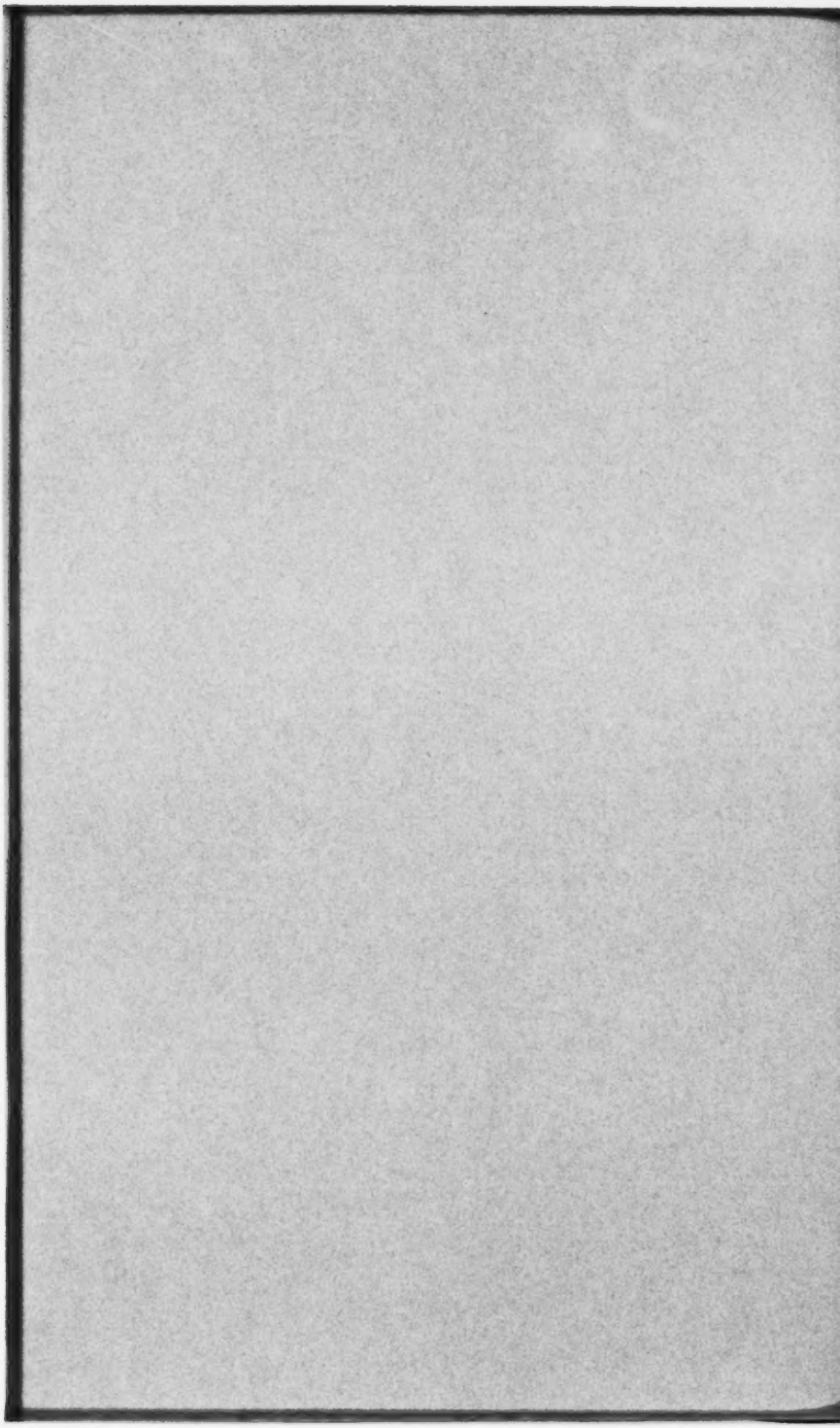
VERSUS

BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

PETITION AMICUS CURIAE OF THE STATE OF OKLAHOMA, EX REL. W. A. PAT MURPHY, COMMISSIONER OF LABOR, REQUESTING THAT CERTIORARI BE GRANTED AS PRAYED BY THE PETITIONER

MAC Q. WILLIAMSON,
Attorney General, State of Oklahoma,

PEYTON FORD,
Chief Attorney, Unemployment Compensation and Placement Division, Department of Labor, State of Oklahoma (Of Counsel).



AUTHORITIES CITED

Page

Acts of 1939, Ch. 121, Sec. 2(g)(4), Sec. 52 - 1502(g)(f) Burns 1933 Pocket Supplement, Sec. 10168 - 2(g)(4) Baldwin's 1939 Supp. 2

Benner-Coryell Lumber Company, Inc., v. Indiana Unemployment Compensation Board, 29 N. E. (2d) 776 2

Gibson Products Company, Inc., et al., v. W. A. Pat Murphy, State Labor Commissioner et al., 186 Okla. 714, 100 Pac. (2d) 453 2

Independent Gasoline Company v. Bureau of Unemployment Compensation, 10 S. E. (2d) 58 (cert. den. by this Court, Nov. 25, 1940; 61 Sup. Ct. 175) 3

Sec. 10(f)(4), Art. 2, Chap. 52, Oklahoma Session Laws 1939 2

NO. 751

In the Supreme Court of the United States

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner,

VERSUS

BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

PETITION AMICUS CURIAE OF THE STATE OF OKLAHOMA, EX REL. W. A. PAT MURPHY, COMMISSIONER OF LABOR, REQUESTING THAT CERTIORARI BE GRANTED AS PRAYED BY THE PETITIONER

Comes now the State of Oklahoma *ex rel.* W. A. Pat Murphy, Commissioner of Labor, as *amicus curiae,* and respectfully prays this Honorable Court to give appropriate consideration to this petition, in connection with the petition to grant certiorari as prayed for by the petitioner in the above styled cause, and for its reasons states:

1.

That a decision by this Court is both desirable and of great public interest to the State of Oklahoma for the reason that Section 10(f)(4) of the Oklahoma Unemployment Compensation Law (Sec. 10(f)(4), Art. 2, Chap. 52,

Oklahoma Session Laws, 1939)[1] is, with minor and immaterial exceptions, identical with Section 2(g)(4) of the Indiana Unemployment Compensation Law (Sec. 2(g)(f), Act of 1939, Chap. 121, Sec. 52 - 1502(g)(f) Burns 1933 Pocket Supplement, Sec. 10168 - 2(g)(4), Baldwin's 1939 Supplement)[2], the validity of which was struck down by the Supreme Court of Indiana in the case of *Benner-Coryell Lumber Company, Inc.*, v. *Indiana Unemployment Compensation Board*, 29 N. E. (2d) 776, sought to be reviewed here.

2.

That the Supreme Court of Oklahoma in the case of *Gibson Products Company, Inc., et al.*, v. *W. A. Pat Murphy, State Labor Commissioner et al.*, 186 Okla. 714, 100

---

[1]"Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly by the same interest, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection." (Sec. 10(f)(4), Art. 2, Chap. 52, Oklahoma Session Laws 1939.)

[2]"Any employing unit which together with one (1) or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection." (Acts of 1939, Ch. 121, Sec. 2(g)(4), Sec. 52 - 1502(g)(f) Burns 1933 Pocket Supplement, Sec. 10168 - 2(g)(4) Baldwin's 1939 Supp.)

Pac. (2d) 453, on February 27, 1940 sustained, under constitutional attack, the validity of Section 10(f)(4), *supra*, of the Oklahoma Unemployment Compensation Law, and while an examination of this case does not reveal that the Fourteenth Amendment to the Federal Constitution, which guarantees to citizens (including corporations) equal protection of the laws, was considered, a reading of the brief filed by the Gibson Products Company, Inc., plaintiff in error shows that this question was presented to the Supreme Court of Oklahoma in said case.

3.

That as a result of the decision of the Oklahoma Supreme Court in the Gibson Products Company, Inc., case, *supra*, the Division of Unemployment Compensation and Placement of the State Department of Labor has determined that approximately 800 employers are subject to the provisions of the Oklahoma Unemployment Compensation Law by reason of Section 10(f)(4) thereof, and a total of approximately 4,000 employees of the aforementioned 800 employers were within the purview of said Oklahoma Unemployment Compensation Law.

4.

That as a result of the decision of the Supreme Court of Indiana in the Benner-Coryell Lumber Company, Inc., case, *supra*, and the decision of the Supreme Court of Georgia in the case of *Independent Gasoline Company* v. *Bureau of Unemployment Compensation*, 10 S. E. (2d)

58 (certiorari denied by this Court on November 25, 1940; 61 Sup. Ct. 175), there has arisen in this State great confusion among the 800 employers and 4,000 employees as to their status under the provisions of Section 10(f)(4) of the Oklahoma Unemployment Compensation Law. From this it has inevitably followed that the administrators of the Division of the Unemployment Compensation and Placement of the Oklahoma State Department of Labor are confronted with disturbing and almost insurmountable administrative difficulties in view of the conflicting interpretation of similar provisions in other states. The questionable status of both employers and employees, and the administrative difficulties attached thereto must necessarily continue until the law has been interpreted and settled by this Honorable Court.

Wherefore, the State of Oklahoma ex rel. W. A. Pat Murphy, Commissioner of Labor, respectfully prays this Honorable Court to grant the petition of the petitioner herein.

MAC Q. WILLIAMSON,
Attorney General, State of Oklahoma,

PEYTON FORD,
Chief Attorney, Unemployment Compensation and Placement Division, Department of Labor, State of Oklahoma (Of Counsel).

FILED
FEB 27 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THE INDIANA
UNEMPLOYMENT COMPENSATION BOARD,
Petitioner

vs.

BENNER-CORYELL
LUMBER COMPANY, INCORPORATED

NUMBER 751

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF NEW MEXICO AS AMICUS CURIAE

EDWARD P. CHASE,
The Attorney-General of New Mexico.

J. R. MODRALL,
Special Attorney for the Unemployment Compensation Commission.

A. M. FRAZIER,
Attorney for the Unemployment Compensation Commission.
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THE INDIANA
UNEMPLOYMENT COMPENSATION BOARD,
Petitioner

VS.

BENNER-CORYELL
LUMBER COMPANY, INCORPORATED

NUMBER 751

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF NEW MEXICO AS AMICUS CURIAE

The Unemployment Compensation Commission of New Mexico (hereinafter referred to for convenience as the Commission), being an agency legally constituted to administer the Unemployment Compensation Law of that State, respectfully presents this brief as amicus curiae in the above entitled cause in support of the Petition of the Indiana Unemployment Compensation Board therein for a writ of certiorari. The Indiana agency asks a review of the decision of the high court of Indiana in the case of Benner-Coryell Lumber Company, Inc. v. Indiana Unemployment Compensation Board,—Indiana—, 29 N. E. (2nd) 776, wherein it was held that a provision of the Indiana

Unemployment Compensation Law, so far as it authorized the combining of employment of two or more commonly controlled corporations for the purpose of establishing liability, was invalid as contravening the fourteenth amendment to the Federal Constitution.

SUMMARY OF ARGUMENT

I. The Commission, as amicus curiae herein, has a substantial interest and concern in the review asked because it is charged with the administration of a statutory provision similar to that invalidated by the Indiana court.

II. The Commission has interpreted and enforced this statutory provision in the manner now condemned, by which employing units not otherwise liable have been made subject and their employees brought within the Act's protection.

III. The adoption by the New Mexico courts of the Indiana decision, upon the suit of an employer thus affected, would surround the Commission's past and present acts with confusion.

IV. The Commission believes that the decision of the Indiana court condemns a legislative classification for determination of subject employers which is sound.

I.

The Commission has a substantial interest and concern in the review asked because it is charged with the

administration of a statutory provision similar to that invalidated by the Indiana court.

Section 19, (f) (4), Chapter 1, Laws of New Mexico, Special Session of 1936:

((f) Employer means:)

(4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection.

Paragraph (1) of this subsection, to be read with the above, was as follows as first enacted:

((f) Employer means:)

(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); (Chapter 1, Laws of New Mexico, Special Session of 1936).

This provision is similar to the present Indiana Law. Subsequently the New Mexico legislature amended it to extend to employers of four or more in twenty weeks (Chapter 129, Laws of 1937), and again later to employing units having two or more employees in any thirteen weeks or a total quarterly payroll equalling $450.00 (Chapter 175, Laws of 1939). This last amendment became effective July 1, 1939, and therefore, with respect to prior periods, the Commission was and is in much the same position as Petitioner in the matter set out in its petition and brief.

II.

The Commission has interpreted and enforced this statutory provision in the manner now condemned, by which employing units not otherwise liable have been made subject and their employees brought within the protection of the Act.

As early as February 12, 1937, only two months after the Act first took effect, counsel for the Commission were asked for and supplied an interpretation of the common control clause. This interpretation and others submitted since, in all of which the several members of the Commission's legal staff have concurred, were the same in effect as that argued for by Petitioner. The result is that the Commission, on the basis of such interpretation, has established the liability of employing units as "employers", required and collected contributions from them, and has paid compensation or benefits to individuals on account of work done for such employers. The benefit and protec-

tion of the law were thus brought to many workers who otherwise would have been subject to all those harsh effects of unemployment which the Act was designed to alleviate. The continuing concern of the New Mexico legislature that the protection of the Act be extended to more and more workers is shown by its repeated amendment and extension of the coverage provisions, as noted in paragraph number 1 above. It may be inferred from this that the legislature intended other coverage provisions, such as the common control clause, to have the broadest possible meaning.

III.

The adoption by the New Mexico courts of the Indiana decision, upon the suit of an employer thus affected, would surround the Commission's past and present acts with confusion.

The seriousness and complexity of the situation resulting from invalidation of the common control clause by the courts of the various states having such a provision, gives weight to Petitioner's request for review and adds to the Commission's concern and interest in the issue. Doubt and uncertainty would be thrown about the status of persons who had drawn or might be drawing benefits on account of work for employers whose liability had been established under the common control provision. The Commission, in the event that this provision of the New Mexico Act were held invalid, might be the object of numerous suits by employers from whom contributions have been required and collected under its authority.

IV.

The Commission believes that the decision of the Indiana court condemns a legislative classification for determination of employers which is reasonable.

The various legislatures may have foreseen that corporations A and B, owned by the same interests and each employing five individuals, might be in competition with corporation C which alone had ten employees. The inequity of allowing the common owners of corporations A and B to escape liability, while corporation C was made subject, would be at least as great as that in the example used conversely by the Indiana court and by the Georgia court (Independent Gasoline Company v. Bureau of Unemployment Compensation,—Georgia—, 10 S.E. (2nd) 58), which decision the former cites with approval. If A and B corporations escaped, a strong inducement would be on C corporation to divide similarly, and thus four corporations and their twenty employees would be outside the law, though the two sets of interests would each be enjoying the benefits and profits derived from the employment of ten workers.

How to guard against the inequities resulting from the multiplication of such situations, without employing a method of classification producing greater inequities, was the legislative task. In doing so the legislature might well disregard the fiction of separate corporate entities and look to see who were the persons controlling and directing the employment and, by reason of their ownership, reaping the profits from such employment. In the phrase "owned

or controlled by the same interests'' the legislatures seem to have chosen a reasonable and logical standard for determining whether the relationship of several affiliated corporations might justify the treatment of their employment together for the purposes of the unemployment compensation laws.

The Petitioner imposed liability on two Indiana Corporations by reason of one individual's ownership of a majority of the stock in both. In condemning this, the Indiana court considered some matters not clearly relevant, such as that corporations made liable in this manner might not be in the same business or might be in different communities, and that ownership of stock is a thing which may and does change often. With reference to the court's discussion of the latter phenomenon, it is to be noted that only corporations with less than eight employees could be affected by the common control provision under discussion, since all with more than eight employees would be liable each in its own right. As to those small corporations affected, it may be said that they are with some exceptions, of the type commonly devised by an individual business man the better to run his own business, and that the stock of such corporations commonly has a more or less fixed ownership. Where the same individual owns controlling stock in more than one such corporation, it simply means in many cases that such a business man is branching out a little as his profits warrant. In such circumstances it could never be said that the legislative classification of employers represented by the common control provision nor the interpretation placed upon it by the Petitioner is unreasonable for the purposes of an unemployment compensation law or inequitable in its broad effects.

The nature of the business carried on by the several corporations and their locations with respect to each other would hardly seem to be matters for consideration in determining whether the legislature has in this instance adopted a reasonable classification of employers for imposition of the tax. Considering the provision in question not only from the latter standpoint, but also as part of an act designed primarily to relieve unemployment, the true criteria by which to measure its validity would seem to be whether the same interest or interests control and direct the employment of several corporations so that the persons employed are in actuality working for the same employer, and whether the same interest or interests reap the greater part of the profits and benefits from the employment of the several corporations.

EDWARD P. CHASE,
The Attorney-General of New Mexico.

J. R. MODRALL,
Special Attorney for the Unemployment Compensation Commission.

A. M. FRAZIER,
Attorney for the Unemployment Compensation Commission.
Of Counsel.

Office - Supreme Court, U.S.
FILED
FEB 28 1941
CHARLES ELMORE CROPLEY
CLERK

No. 751

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

INDIANA UNEMPLOYMENT COMPENSATION BOARD, *Petitioner*,

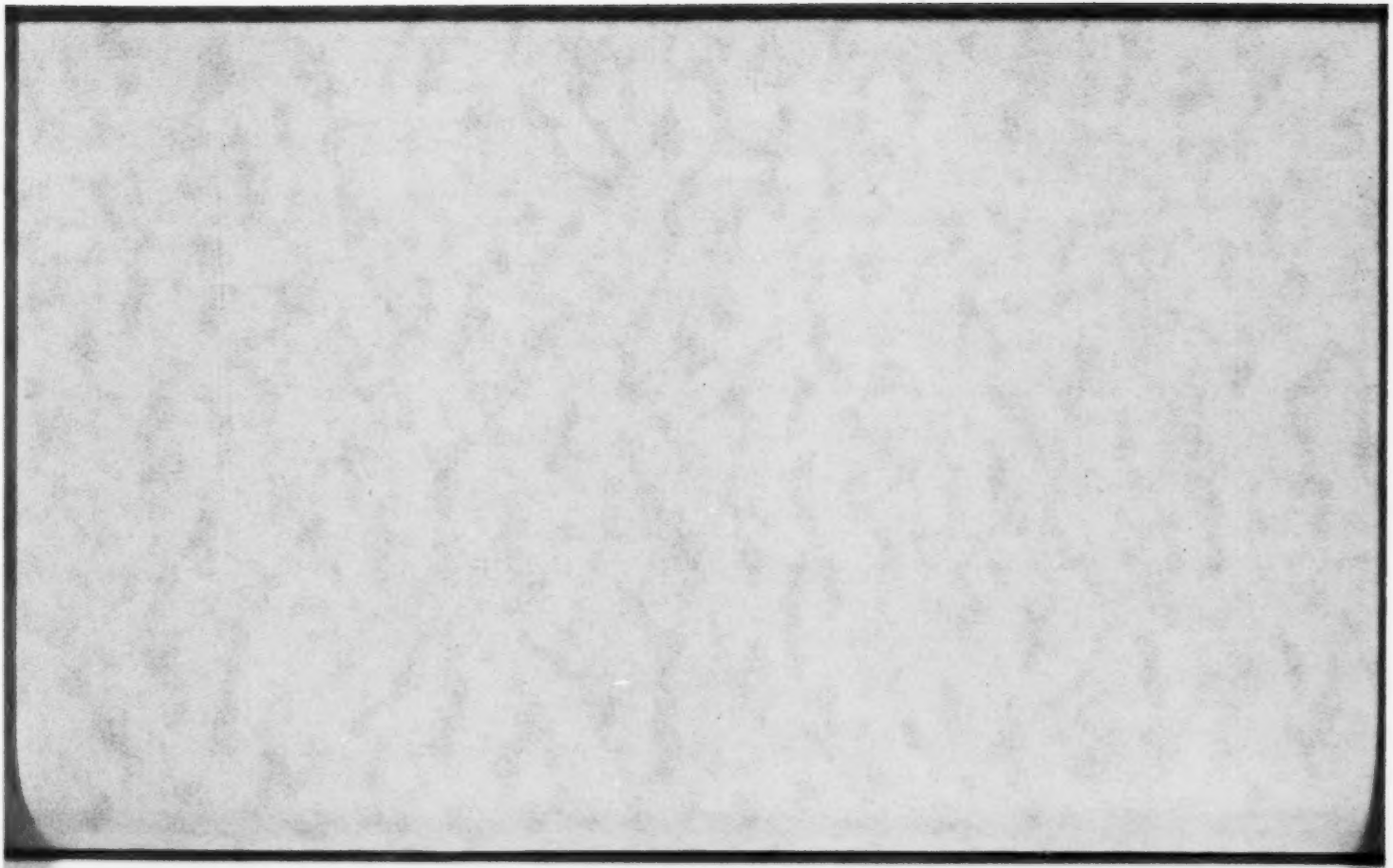
vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED, *Respondent*.

PENDING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR THE UNEMPLOYMENT COMPENSATION COMMISSION OF MISSOURI SUBMITTED AS A FRIEND OF THE COURT.

HARRY G. WALTNER, JR.,
Chief Counsel
Unemployment Compensation
Commission of Missouri.



No. 751

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

INDIANA UNEMPLOYMENT COMPENSATION BOARD, *Petitioner*,

vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED, *Respondent*.

PENDING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE UNEMPLOYMENT COMPENSATION COMMISSION OF MISSOURI SUBMITTED AS A FRIEND OF THE COURT.

IF IT SO PLEASE THE COURT:

This brief is presented on behalf of the State of Missouri acting through the Unemployment Compensation Commission, a statutory body charged with the duty of administering the Missouri Unemployment Compensation Law. (Sections 4 and 5 of the Missouri Unemployment Compensation Law, page 574, Laws of Missouri 1937; Section 5 of the Missouri Unemployment Compensation Law, page 894, Laws of Missouri 1939.) Under such statute the Commission has the power and the duty to appoint counsel to represent the State

in the administration of this Law (Section 5 (d) supra). This brief is not filed by the attorney general of the State, such official while being a constitutional officer, his duties are fixed by law (Section 1, Article V, Constitution of Missouri), and the Unemployment Compensation Law places no duty on the attorney general in respect to its administration.

The State of Missouri and the Unemployment Compensation Commission are directly affected by the outcome of this case, as Section 3 (h)(4) of the Missouri Unemployment Compensation Law is almost identical with the Indiana Law which has been erroneously construed by the highest court of that State. This section reads as follows:

> " 'Employer' means"
>
> * * * * *
>
> "Any employing unit which, together with one or more other employing units, is owned or controlled by legally enforceable means or otherwise, directly or indirectly, by the same interests, or which owns or controls one or more other employing units by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;"

Not only is this section of the Missouri Law directly affected by this decision, but the basis upon which it is rendered could logically support a decision holding void other sub-sections of the Missouri Unemployment Compensation Law which would have a disastrous effect upon the administration of the Missouri Act. By these sub-sections, the Missouri Legislature in an analogous manner defined certain employing units, not necessarily employing eight workers, to be employers under the Law. The sub-sections are identified as Section 3 (h)(2) and Section 3 (h)(3) of the Missouri Act (Laws of Missouri 1939, page 888) and read as follows:

> "(2) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Act;

"(3) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit (not an employer subject to this Act) and which, if subsequent to such acquisition it was treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;"

In filing this memorandum we shall not repeat the authorities which have been set out in the brief filed by the Indiana Unemployment Compensation Board, but we do desire to advise the Court that the decision of the Indiana Court is of substantial importance to every state administering an unemployment compensation law, and respectfully urge the Court to take jurisdiction of this cause so that an authoritative decision may be rendered which will be authority for state administrators in the administration of their respective laws and of assistance and guidance to state supreme courts in the application of appropriate provisions of state constitutions to these statutory provisions.

This section of the Missouri Law, which places all employing units under the ownership or control of the same interests, in the same position as a single employing unit, has been effective time and time again in carrying out the legislative purpose of the Missouri Unemployment Compensation Law. Under the Missouri Law no employer is required to pay the contributions, nor are his workers entitled to the benefits of the Act unless he employs eight or more individuals in one day in each of twenty different weeks during a calendar year. Without the provisions of Section 3 (h)(4), Sections 3 (h)(2) and 3 (h)(3), employing units could easily evade liability under the Law, and thus deprive their workers of the benefits and advantages of the Law, by the division of their establishments or by transferring the business to another employing unit before the required twenty weeks of employing eight or more individuals had occurred. We have made a careful analysis of those employing units who were employers at the close of business, December 31, 1940, and from that

analysis we find that we now have six hundred fifty-two employers currently liable under the Unemployment Compensation Law of this State by virtue of Section 3 (h)(4), who had during the quarter ending December 31, 1940 over eight thousand workers performing services for them during that quarter. These figures indicate a very interesting fact, that is, that the average number of workers actually affected by this provision of the Act during a given three-month period was in excess of twelve persons per employer.

This, of course, is brought about by the fact that the labor turnover in these units is high and the number of individuals employed at a given time vary considerably. In the event this Section 3 (h)(4) of the Law is not sustained, these workers will lose the beneficial effects of this Law and the risk of their unemployment cannot be met by the plan established to absorb this economic loss. We are unable at this time to suggest to the Court the number of employers or workers who are involved under Section 3 (h)(2) and 3 (h)(3) of the Law, but it is our judgment that it would equal, if not exceed, the number affected by Section 3 (h)(4).

We also call attention to the fact that many other employers have, in the past, been held liable because of Section 3(h)(4) and many workers gained benefits under that Section, but because of sales of units, dissolutions, etc., they are not now active employers and hence not included in the above figures.

We respectfully urge upon this court that this statutory provision is a proper and reasonable exercise of legislative authority and entirely consistent with constitutional guarantees. It definitely prevents evasion of the Law, and to a far greater degree than the figures which have been submitted to this court show. And if this Section cannot be sustained there will be many, many employers who are just on the borderline who can easily and profitably divide their business or contract it out under agreements by which they still maintain control and thus avoid the tax liability and deny to their workers unemployment benefits.

The status of this Section of the Missouri Law has been made doubtful by reason of the decision of the Supreme Court of Indiana in this case which followed so closely upon the decision of the Supreme Court of Georgia in the case of *Independent Gasoline Company* vs. *Bureau of Unemployment Compensation of Georgia*, ———— Ga. ————, 10 S. W. 2nd 58, Certiorari denied, ———— U. S. ————, 61 Sup. Court 171 passing upon a similar provision of the Georgia law. These two decisions coming so closely together and involving constitutional provisions substantially similar present very serious obstacles to state boards and commissions charged with the duty of administering and enforcing the provisions of the laws. Not only are employers not heretofore liable under the Law taking issue with the Commission in the application of Section 3 (h)(4) to their operations, but many of the employers who have heretofore complied with the Law are now raising a question as to the validity of this provision. Thus, the status of their workers is under a cloud and some are receiving benefits while others are being denied compensation, at least temporarily, because of the refusal of the employers to comply with the Law, basing their action upon these decisions. Not only that, but if Section 3 (h)(4) is violative of the Federal Constitution and, therefore, invalid, all state agencies should know of that invalidity at the earliest possible moment so that benefits will not continue to be paid to workers who are not under the Law entitled to them, and so that adjustment or refund of contributions erroneously collected can be made to the parties entitled to them before such refunds are barred by applicable limitation statutes. In this connection, reference is made to Section 15 (d) of the Missouri Unemployment Compensation Law, page 920, Laws of Missouri, 1939, which Section limits the authority of the Missouri Commission to refund contributions to contributions which have been erroneously collected and in respect to which application for refund is filed within one year of the date that the contributions otherwise would have been due.

It is certain that substantial expenses will be involved in the clarifying of the status of Section 3 (h) (4) of the Missouri

Law and similar sections of other state laws unless this Court takes jurisdiction of the instant case and determines this issue finally and completely. Because of the substantial and widespread interest in this provision of the law, and because of the particular and special problems which the decisions of the Supreme Court of Georgia and the Supreme Court of Indiana present to the State of Missouri in the administration of the Missouri Unemployment Compensation Law, this State has filed this brief and respectfully prays this court to take jurisdiction in this case and render an authoritative decision on the issues involved.

HARRY G. WALTNER, JR.
Chief Counsel

Unemployment Compensation
Commission, State of Missouri

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 761

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-COREYELL LUMBER COMPANY,

Respondent.

BRIEF FOR THE [illegible]
OF NORTH DAKOTA, [illegible]
SUPPORTING [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INC.

Respondent.

BRIEF FOR THE WORKMEN'S COMPENSATION BUREAU OF THE STATE OF NORTH DAKOTA, ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT.

MAY IT PLEASE THE COURT:

The Workmen's Compensation Bureau of the State of North Dakota, one of whose divisions is the Unemployment Compensation Division of the State of North Dakota, appears on this application as a friend of the Court.

Chapter 232, Session Laws of the State of North Dakota for 1937, as amended by Chapter 215, Laws of North Dakota for 1939, is the Unemployment Compensation Statute of this State and contains at Section 2 (f) (4) thereof the following language:

> "Employer" means:
>
> "Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, or interests, or both, would be an employer under paragraph (1) of this subsection."

It will be noted that this section is identical with that in the Indiana Unemployment Compensation Statute which is the provision in issue in the above entitled action. Inasmuch as the Supreme Court of the State of Indiana has held that the language thus used contravenes the provisions of the Federal Constitution, this Bureau has become materially interested in the outcome of this litigation, especially as it appears there is at stake what this Bureau deems to be a vital prop to the administration of its own unemployment compensation law.

In this petition we are not citing authorities which are already cited and discussed in the brief submitted by the Indiana Unemployment Compensation Board, but wish to draw the attention of the Court to the importance of this particular decision to the administration of the North Dakota Unemployment Compensation Law.

North Dakota is a State containing many small employers. Under the North Dakota Unemployment Compensation Law an employer is not subject to the Act unless he employs eight or more employees for some portion of a day in each of twenty different weeks in any one calendar year.

The common control provision above cited has been found by this Agency to be indispensable in the administration of this law for the reason that many small employers are brought within the

provisions of the law by reason of the fact that they are chain establishments, or owned or controlled by a few companies or interests. For example, at the present time a very large proportion of all the retail business done within this State is done by chain stores or enterprises controlled by a single company. The only reason that the classification set out in the Statute may be considered a reasonable means of relieving small businesses of unnecessary burdens is by the so-called "common control" provision. Were this provision taken from the Statute, it would be an open invitation to evade the law by the division of establishments, and at the same time would free the chain stores and similar businesses of the obligation to contribute to the Unemployment Compensation Fund, which in some measure at least equalizes the competitive difficulty of the small merchant. Without this provision perhaps 8000 workers, or approximately twenty per cent of all the workers covered by the Unemployment Compensation Law of North Dakota, would be denied the protection of the Unemployment Compensation Law.

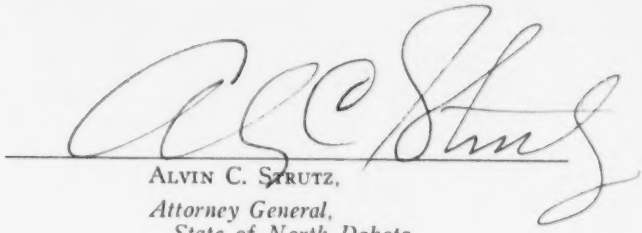
We feel it is hardly necessary to elaborate on the argument of the Indiana Unemployment Compensation Board as to the ease with which the unemployment compensation law could be evaded by astute business techniques without this provision in the Statute.

We also contend that the common control provision above cited will not only avoid an evasion of the law but will also guarantee that businesses in the same general status will be treated alike. It avoids a discrimination which a sharp classification in terms of the employment of eight or more individuals, as now provided in the North Dakota Statute, would certainly cause, and avoids the unfair situation of large scale business organizations being treated differently for the reason that one of such businesses has found it feasible to effect a division of its establishments, while the other has not.

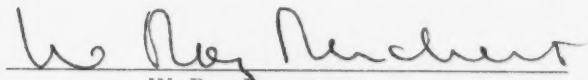
The interest of this Agency in this litigation, flowing from the doubts cast upon the validity of the common control provision, by

reason of the decision of the Indiana Supreme Court, is further based upon the extreme administrative difficulties which have arisen by reason of this decision, and which we trust may now be settled so far as the Federal Constitution is concerned, by a decision of the United States Supreme Court. Following as it did upon the heels of the decision of the Georgia Supreme Court in *Independent Gasoline Company v. Bureau of Unemployment Compensation of Georgia,* 10 S. E. (2d) 58, cert. den. S. Ct. 175, has raised a serious enforcement problem in North Dakota. Many employers who previously accepted this provision of the law without question have now either applied for refunds of contributions previously paid, or have refused altogether to contribute further to the Unemployment Compensation Fund. The status of the workers employed by these employers is now seriously in doubt, and while this Agency is continuing to pay benefits to such workers, the status of such payments may eventually raise a serious question.

We submit therefore, that this matter should be settled at the earliest possible moment and it is for this reason that this State has filed this statement and respectfully requests that this Court take jurisdiction so that an authoritative decision may be given concerning the constitutionality of the provision in question and the administration of an enlightened program of unemployment compensation may proceed unimpeded by dilatory litigation.



ALVIN C. STRUTZ,
Attorney General,
State of North Dakota.



W. RAY REICHERT,
Chief Counsel,
Unemployment Compensation Division of the Workmen's Compensation Bureau of the State of North Dakota.

FILED
FEB 28 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,

Respondent.

BRIEF OF THE MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

GREEK L. RICE,
Attorney General of the State of Mississippi.

C. B. CAMERON,
Attorney and Executive Director, Mississippi Unemployment Compensation Commission,

HARRY M. BRYAN,
General Counsel, Mississippi Unemployment Compensation Commission,

Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,

Respondent.

BRIEF OF THE MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

MAY IT PLEASE THE COURT:

The Mississippi Unemployment Compensation Commission, created by and existing under the authority of the Misssissippi Unemployment Compensation Law, appears as a friend of the court. It wishes to manifest and record its interest in the outcome of this litigation. It deems the questions involved herein to be of paramount importance. Directly affected by this action is a provision of the Mississippi Unemployment Compensation Law, considered vital to its effective administration.

The "common control" provision of the Indiana statute is substantially similar to Section 19(h)(4) of the Mississippi Law which is as follows:

"19(h) 'Employer' means:
* * * *

"(4) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection."

By the enactment of the above provision the Mississippi Legislature will be presumed to have had in mind the accomplishment of a definite purpose, consistent with its policies as declared by the Act. Giving due consideration to the existence of certain economic conditions and anticipating the problems of administration, the Legislature, with other impelling reasons, recognized the fact that an employer, with eight or more employees, could easily split his operations into smaller units, each with less than eight employees, and thus take himself from without the basic "coverage" provisions of Section 19(h)(1) of the Law. Further, the Legislature acted to afford the benefits of unemployment insurance to a large class of workers, who, because of employment by smaller units effectively controlled by the same interests, occupy an economic status precisely similar to those performing services for individuals or units having eight or more employees.

This Commission is a party to a proceeding now pending in a court of its state wherein the federal constitutionality of Section 19(h)(4) of the Mississippi Unemployment Compensation Law is attacked. The federal questions involved in the case at bar are present in the suit to which it is a party.

Following the decision of *Independent Gasoline Company v. Bureau of Unemployment Compensation of Geor-*

gia, 10 S. E. (2d) 58, Cert. Den._____U. S._____, 61 S. Ct. 175, the status of many employing units directly affected by the "common control" provision of the Mississippi Act, has rested in doubt and uncertainty. This doubt and uncertainty will continue to exist until final judicial action is had.

Section 14(k) of the Mississippi Unemployment Compensation Law authorizes and empowers this Commission to make refund of contributions, interest and penalties, collected under the Act, "as it may determine were paid erroneously by an employer . . . . " A certain period is provided within which an employer shall make written application for such refund. The written application, filed within the prescribed period, is a condition precedent to the allowance of such refund. It is apparent, therefore, that it is to the manifest interest of this Commission and to employers of doubtful status that there be an authoritative and final decision of the federal questions involved herein as soon as possible. Upon such decision also will depend the rights of many potential claimants under the Act since only those workers who earn wages in "covered" employment are eligible for such benefits.

It is not our purpose to burden the court with a repetition or re-statement of the authorities which have been presented in the brief filed by the Indiana Unemployment Compensation Board. However, in addition to the reasons ascribed above, we respectfully urge that review on writ of certiorari should be had herein because "a state court has decided a federal question of substance not theretofore determined by this court", and, further, "has decided it in a way probably not in accord with applicable decisions of this court", reasons which this court, under its Rule 38, par. 5(a) considers in the exercise of its discretion.

If the decision of the Indiana court is permitted to stand serious questions affecting future rights of this state to classify for purposes of taxation will arise; it will give impetus, undoubtedly, to further litigation involving employers who have already paid contributions under the

Mississippi Law by virtue of the "common control" provision and to actions involving benefit rights thereunder.

The State of Mississippi files this application with its prayer that this court take jurisdiction on appeal in order that a final and authoritative decision may be had concerning the federal constitutionality of the provision in question.

GREEK L. RICE,
Attorney General of the State of Mississippi.

C. B. CAMERON,
Attorney and Executive Director,
Mississippi Unemployment Compensation
Commission.

HARRY M. BRYAN,
General Counsel,
Mississippi Unemployment Compensation
Commission.

FEB 28
CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED.

BRIEF FOR THE STATE OF ILLINOIS ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois.

JAMES W. BREEN,
Assistant Attorney General,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED.

BRIEF FOR THE STATE OF ILLINOIS ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

MAY IT PLEASE THE COURT:

The State of Illinois, by its Attorney General, George F. Barrett, appears on this application as a friend of the Court.

The State of Illinois has in its unemployment compensation law a "common control" provision very similar to that of the Indiana Unemployment Compensation Law. It reads as follows:

"Employer means:

* * * * *

"Any employing unit which, together with one or more other employing units, is owned or controlled, directly or indirectly, *by legally enforceable means or otherwise,* by the same interests, or which owns or controls one or more other employing units directly or indirectly, *by legally enforceable means or otherwise,* and which, if treated as a single unit with such other employing units or interests or both, would be an employer under paragraph (1) of this subsection."[1] Sec. 2(e)(5) [Ill. Rev. Stat. 1939, Chap. 48, Sec. 218] (Italics supplied.)

Your applicant will not burden this Court with a repetition of the authorities which have been cited and discussed in the brief submitted by the Indiana Unemployment Compensation Board. The State shall confine itself to showing the importance of this issue to the administration of the Illinois Unemployment Compensation Law.

The above quoted provision has been found to be necessary in order that the law may be more effectively and equitably administered. Under the Illinois Unemployment Compensation Law no employer is subject to the Act unless he employs six or more workers. The "common control" provision was intended to prevent evasion of the law by large business organizations through the practice of creating smaller units. Without it, thousands of workers would be denied the benefits intended to be secured by the Unemployment Compensation Act of Illinois. In fact, the law would become another legislative act to be avoided by shrewd business methods. The Indiana Unemployment Compensation Board did not exaggerate in its statement as to the ease with which the law could be evaded without this provision.

---

[1] Words in italics are not present in the Indiana law.

If the decision of the Indiana Supreme Court which held this provision to be violative of the Fourteenth Amendment of the Federal Constitution is permitted to stand, by reason of this Honorable Court's refusal to assume jurisdiction, it will serve as an ill-advised precedent to the courts of Illinois in construing the Illinois Act.

It is also urged that the "common control" provision guarantees that businesses in the same general status will be treated on a parity. It avoids unfair competition between two large scale business organizations where one has effectuated a division of its functioning establishments and the other has not.

Furthermore the decision of the Indiana Supreme Court has created a serious enforcement problem in this State. Especially is this true because the Indiana decision came so soon after the similar decision of the Georgia Supreme Court in the case of *Independent Gasoline Company* v. *Bureau of Unemployment Compensation of Georgia*, ... Ga. ...., 10 S. E. (2d) 58, cert. den. .... U. S. ...., 61 S. Ct. 175. Employers in Illinois operating separate employing units under "common control" are now questioning their liability for contributions heretofore paid under the law and are filing claims for refunds. Some employers are refusing to pay currently due contributions. Employees of the aforesaid employers have been paid benefits by virtue of this provision. Their status, as covered workers, is now in doubt and serious questions have arisen as to the propriety of benefit payments heretofore made and those presently being made.

It is submitted that the decision of the Indiana Supreme Court is ill-advised and ill-considered and has created serious administrative problems for the State of

Illinois. For these reasons we respectfully suggest that this Honorable Court allow the writ of certiorari.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois.

JAMES W. BREEN,
Assistant Attorney General,
Of Counsel.

FILED
MAR 1 1941
CHARLES ELMORE CROPLEY
CLERK

No. 751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER CORYELL LUMBER COMPANY, INC.

Respondent.

Brief of Amicus Curiae in Support of Petition for Writ of Certiorari.

J. Tom Watson,
Attorney General of Florida.

Lewis W. Petteway,
Assistant Attorney General.

John P. Mack,
General Counsel,
Florida Industrial Commission,
Of Counsel.

INDEX

PAGE

Preliminary Statement 1

Opinions below 2

Statement of ground for jurisdiction 2

Statutes involved 2

Argument 4

Common control provision essential and permissible to prevent evasion 4

Conclusion 8

TABLE OF CASES CITED

PAGE

Euclid v. Ambler Co., (1926) 272 U. S. 365 7

Florida Industrial Comm. v. Gary-Lockhart Drug Co. (Fla.) (1940), 196 So. 845 2

Helvering v. Bullard, (1938) 303 U. S. 297 7

Helvering v. City Bank Farmers Trust Co. (1935) 296 U. S. 85 7

Independent Gasoline Co. v. Bur. Unemployment Comp. of Georgia, (Ga.) (1940) 10 S. E. (2d) 58 5

Maine Unemployment Comp. Comm. v. Androscoggin, Jr., Inc., (Me.) (1940) 16 Atl. (2d) 252 6

New Colonial Ice Co. v. Helvering ( ) 292 U. S. 435, 442 8

Ruppert v. Caffey (1920) 251 U. S. 264, 282 7

Tyler v. United States, (1930) 281 U. S. 497 7

United States v. Whyel, (1927) 19 Fed. (2d) 260 5

STATUTES

PAGE

Indiana Unemployment Compensation Law, Sec. 52-1501 et seq. Burns' Ind. Stat. Anno. 1940 Supp. 3

Florida Unemployment Compensation Law, Acts 1937, Chapter 18402, as amended Acts 1939, Chapter 19637 .....3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 751

INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER CORYELL LUMBER COMPANY, INC.

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT

The State of Florida, by its counsel, submits this brief, as amicus curiae, in support of the petition for writ of certiorari to the Supreme Court of Indiana for the reason that it has a material interest in the outcome of this litigation since it involves the validity of provisions of the Indiana Unemployment Compensation Law which are analogous to provisions of the Florida Unemployment Compensation Law. If the questioned provisions of the Indiana Law are stricken as violative of the Federal Constitution, then the effective administration of the similar provisions of the Florida Law will be materially impaired.

OPINIONS BELOW

The decree of the trial court is set forth in the Record (p. 9). The opinion of the Supreme Court of Indiana (R. 12) is not yet reported in the official State reports but is reported in 29 N. E. (2d) 776.

The constitutionality of the quoted provisions of the Florida Unemployment Compensation Law has not been passed upon by the Supreme Court of Florida; however, that court has construed the same and interpreted the meaning thereof in the case of *Florida Industrial Commission, et al vs. Gary-Lockhart Drug Company, Inc. et al,* which opinion is reported in 143 Fla. 293.

STATEMENT OF GROUND OF JURISDICTION

The grounds in which this court has jurisdiction have been stated by the petitioner in their Petition For Writ Of Certiorari herein and we do not deem it necessary to further enlarge on this statement.

STATUTES INVOLVED

Employing Units, whether they be any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which control the employment of eight or more persons, are subject to the Unemployment Compensation Law of Indiana and the Florida Law is identical with the Indiana Law in this respect.

The basic definition of the term employer as that term is used in the Indiana Unemployment Compensa-

tion Law, Acts 1936 (Spec. Sess.), Chapter 4, page 80; as amended by Acts 1937, Chapter 125, page 705; as amended by Acts 1938 (Spec, Sess.), Chapter 6, page 24; as amended by Acts 1939, Chapter 121, page 585 [Burns' Ann. Stat. (1940), 52-1501, et seq.], includes:

> "Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);" (Sec. 2 (g) (1) of the Law) [Burns' Ann. Stat. (1940), 52-1502 (g) (1)].

Section 2 (g) (4) of the Indiana Unemployment Compensation Law [Burns' Ann. Stat. (1940), 52-1502 (g) (4)], includes within the term employer:

> "Any employing unit which together with one or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;"

The basic definition of the term employer as that term is used in the Florida Unemployment Compensation Law, Acts 1937, Chapter 18402; as amended by Acts of 1939, Chapter 19637, includes:

> "Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different calendar weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment eight or more individuals (irrespective of whether the same individuals

> are or were employed in each such day)" [Par. I, Sec. 3, Subd. G, Chapter 19637, Acts of 1939, Laws of Florida (Florida Unemployment Compensation Law)].

Par. IV, Sec. 3, Subd. G, Ch. 19637, Acts of 1939, Laws of Florida (the Florida Unemployment Compensation Law) includes within the term employer:

> "Any employing unit which, together with one or more employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests or by husband and wife, or which owns or controls one or more other employing units or a majority of the voting stock of one or more corporations (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing units, or interests, or both, would be an employer under Paragraph 1 of this subsection."

ARGUMENT

It is not our desire to unnecessarily burden the court with a repetition of the argument advanced by petitioner as reasons for granting the Writ of Certiorari herein, but we would like to address our argument briefly to that phase of the case primarily concerned with common control of employing units as classified under the Unemployment Compensation Laws.

COMMON CONTROL PROVISION ESSENTIAL AND PERMISSIBLE TO PREVENT EVASION.

Laws applicable to employers of eight or more can very easily be evaded by the simple procedure of splitting establishments. Particularly is this true in certain types of businesses where labor costs represent a substantial part of the total expense of operation and

where efficiency would not be materially impaired by a division into several and smaller units. In such instances an employer would find it profitable to split his establishments into several small units, each employing not more than six or seven employees.

An Unemployment Compensation Law materially affecting the welfare of many individuals cannot be successfully administered under circumstances permitting such obvious evasions.

It appears, therefore, that the clear purpose of the quoted provisions of the Florida Law, and other State laws containing similar provisions concerning the liability of employing units under common control, was to safeguard the interest of the Government against possible loss of revenue for unemployment compensation purposes which would result from the simple procedure of splitting establishments into smaller units, each employing less than the number of employees required to bring them within the terms of the Act.

Where unity of control between corporations actually exists, the legislative body undoubtedly has power to enact legislation so as to prevent manipulating in order to avoid taxation.

United States vs. Whyel 19 F. (2d) 260-262 (1927).

The opinion in the Indiana case, a review of which is sought by the petitioner herein, is based almost entirely upon the reasoning in the case of *Independent Gasoline Company vs. Bureau of Unemployment Compensation* (Ga.) (1940) 10 S. E. (2d) 58. In the Georgia case, supra, the court said:

> "The defendant is a corporation and as such is an artificial person . . . this legal entity re-

> tains its separate and independent character regardless of the ownership of its capital stock and as such it cannot be held liable for the obligation of a stockholder, nor are the stockholders liable for the obligations of the corporation."

However, in a later case, *Maine U. Comp. Com'n. vs. Androscoggin Junior, Inc.*, 16 A (2d) 252, the Supreme Court of Maine in upholding the validity of a similar provision in the Maine Unemployment Compensation Law said:

> "While it is true that a corporation is a separate entity from its stockholders, yet it is apparent that the legislature, when it enacted this statute, intended to go behind the corporate veil and discover actuality and if it were found that the company, although a corporation, were one so controlled, compel contribution. Otherwise, an individual intending to carry on a business of considerable magnitude, requiring the employment of many more than eight, could organize several corporations, each employing less than eight, escape contribution, and deprive many employees of the benefits intended by the Act.
>
> "In *Coffin et al. v. Rich*, 45 Me. 507, 71 Am. Dec. 559, a statute was held constitutional that provided that stockholders should be personally liable for debts contracted by the corporation following the enactment of the statute. Also see *Eames v. Savage*, 77 Me. 212, 219, 52 Am. Rep. 751; 34 *Harvard Law Review*, 584; 27 *Harvard Law Review* 386; 42 *Harvard Law Review*, 955; *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 31 S. Ct. 387, 55 L. Ed. 458; *Chicago, Milwaukee & St. P. Railroad Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490 on page 501, 38 S. Ct. 553 on page 557, 62 L. Ed. 1229. In the latter case, the Court said:
>
> "In such a case the courts will not permit themeslves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal

> with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

Also in the Georgia case, supra, the court said:

> "It is contended, however, that the classification is justified as a means for enforcing the law and preventing its evasion. No doubt exists as to the right of the legislature to enact any legal provision that will prevent evasion and aid in the enforcement of a legal enactment. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184. But this rule should never sustain an act that places a burden upon innocent and helpless minority stockholders solely because of the status of the majority stockholder who might seek to evade his legitimate obligations under the statute. Such provision to the extent of the pro rata share of the tax borne by the minority stockholder enabled the majority stockholder to escape his obligations."

And yet the avoidance of evasion has generally been upheld as a basis for classification. See *Tyler v. United States,* (1930) 281 U. S. 497, 505; *Helvering v. Bullard,* (1938) 303 U. S. 297, 302; *Helvering v. City Bank Farmers Trust Co.,* (1935), 296 U. S. 85, 92; *Ruppert v. Caffey,* (1920), 251 U. S. 264, 282.

The mere fact that some innocent parties come within the purview of such provision is not material if the classification is otherwise reasonable. The harmless is often times brought within the regulation or prohibition in order to abate or destroy the harmful. *Euclid v. Ambler Company* (1926) 272 U. S. 365.

It is a general rule that a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems. Of course, the rule, however, is subject to the qualification that the separate

identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the protection or enforcement of public or private rights. *New Colonial Ice Company v. Helvering*, 292, U. S. 435 (442).

CONCLUSION

The decision of the Indiana Court in the instant case, if allowed to stand, will have the effect of denying the protection and benefits of the Unemployment Compensation Law to a great number of workers, not only in the State of Indiana but the State of Florida and other States having similar provisions in their laws. It will create an unfair competitive situation as between large scale business organizations where one operates as an integrated business and the other finds it feasible to effect division of its functions, thereby resulting in severe economic discrimination. It will permit an obvious device for wholesale evasion of the Unemployment Compensation Law and will raise serious questions affecting the future rights of the States and their legislatures to classify subjects of taxation in accordance with the needs of legislation at issue. And finally, it will give impetus to a volume of litigation involving employers who have previously paid contributions under the common control provisions and by others involving the charging of benefit payments, which have been made to employees brought under the law by virtue of the common control provisions, to the accounts of their employers.

Since the opinions in the Georgia case and the Indiana case have been handed down, the implications of the Federal question contained in said decisions

have raised a very serious question of enforcement in the State of Florida. Many of the employers of this State who have been brought under the law by virtue of the common control provisions and have paid contributions thereunder are now questioning their liability. A number of claims for refunds have been filed and difficulty is being encountered in collecting contributions which are now due. The agency of this State which administers its Unemployment Compensation Law is faced with a strong possibility that a volume of litigation will follow in this State, raising questions of the constitutionality of the common control provisions under the Federal Constitution.

And so it is that the State of Florida, as amicus curiae, urgently prays that this Court will take jurisdiction of this cause in order that a final and authoritative decision may be given concerning the constitutionality of the questioned provisions of the Unemployment Compensation Law and thereby avoid the loss of material rights by citizens of this and other States under the unemployment compensation program and at the same time prevent a volume of unnecessary, costly and burdensome litigation thereon.

Respectfully submitted,

J. Tom Watson,
Attorney General.

Lewis W. Petteway,
Assistant Attorney General.

John P. Mack,
General Counsel,
Florida Industrial Commission.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

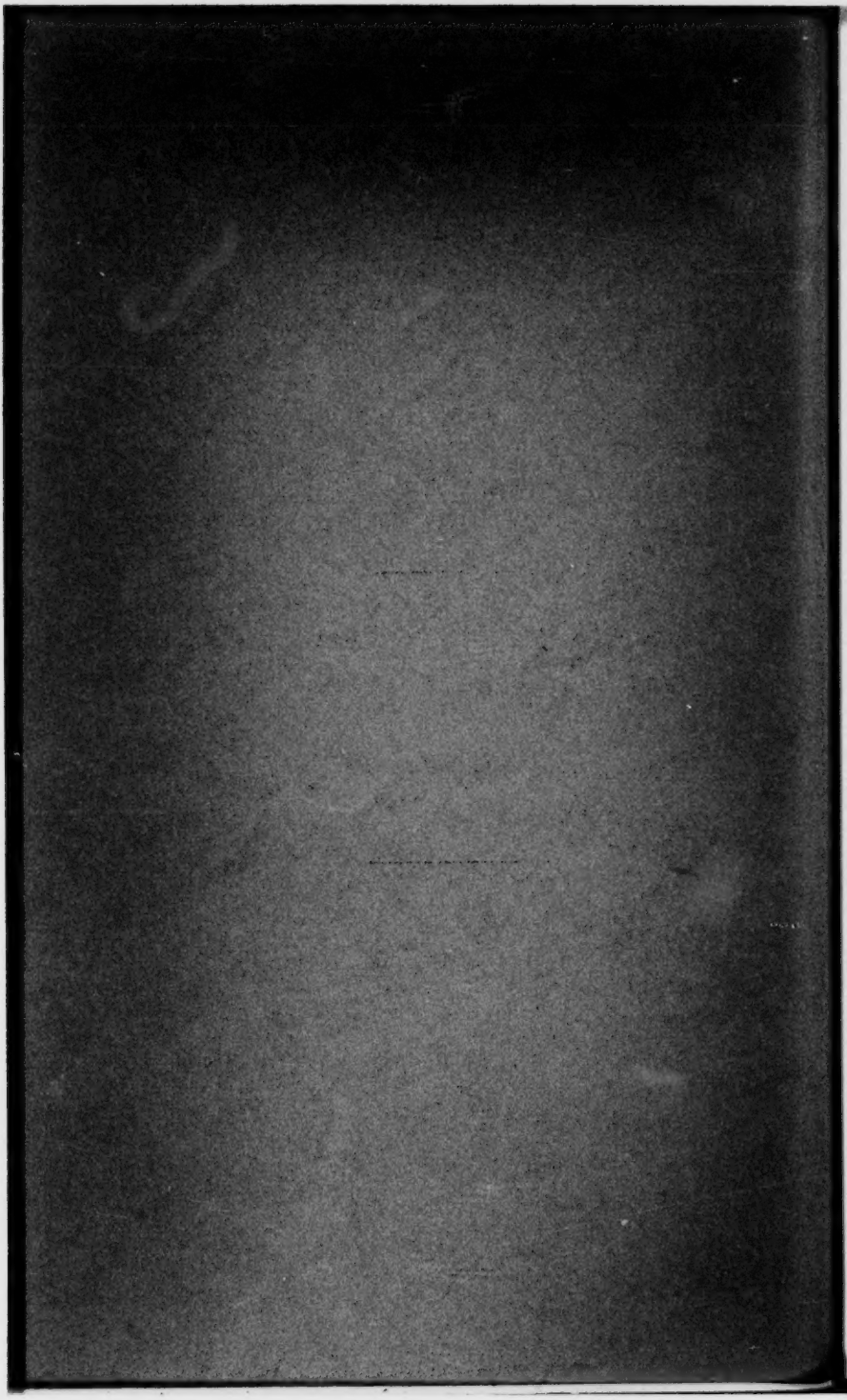
NO. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF MAINE ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED

BRIEF FOR UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF MAINE ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED

BRIEF FOR UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF MAINE ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT

MAY IT PLEASE THE COURT:

The Unemployment Compensation Commission of the State of Maine appears on this application for a writ of certiorari as a friend of the court.

The Maine Unemployment Compensation Commission is interested in the final determination by the highest court of the United States of the subject matter in the above entitled

case since the principle involved is directly connected with the administration of the Unemployment Compensation Law of Maine.

Section 19 (f) (4) of chapter 192 of the public laws of Maine, 1935 as amended provides:

> "Employer means * * * (4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls 1 or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, or interests, or both, would be an employer under paragraph (1) of this subsection."

The foregoing section of the Maine statute is substantially the same as the section of the Indiana Unemployment Compensation Law involved in this action.

The Supreme Judicial Court of Maine has passed upon the validity, construction and application of this section of the Maine statute and has found the same constitutional and proper. In view of the decision by the highest court of Indiana in the above entitled action, it is not only possible but expected that the Indiana case will be cited and used to cast doubt upon the application of the decisions heretofore rendered by the Supreme Judicial Court of Maine. The Maine decisions pertaining to this section of the statute are as follows: No. 605 Maine Unemployment Compensation Commission vs. Androscoggin, Junior, Inc.; No. 606 Maine Unemployment Compensation Commission vs. Edward M. Healy; No. 1010 Maine Unemployment Compensation Commission vs. E. J. Conquest. 16 (A) 2nd 252.

The fundamental basis upon which employer liability is imposed by the Maine statute is the employment of eight or more persons. So long as this establishes the primary basis for liability, it appears to be necessary to provide by statute for liability in apparent exceptional cases in order to prevent evasion of liability. The common control section of the statute prevents an employer of eight or more from so organizing his business in units or divisions as to have less than eight in the respective units and thereby evading liability to pay unemployment contributions. The statutory classification by which liability is imposed upon employers of eight or more is in part justified as a reasonable classification because of the statutory provision which operates to prevent evasion of the statutory classification. In the absence of a liability imposed by virtue of a common control section, the possibility of evading employer liability would be so open as to deny to a substantial number of workers the right to unemployment benefits. The Unemployment Compensation program, however, was conceived to give to workers a degree of security against the hazards of unemployment.

There are 4037 employers currently liable to pay contributions to the Unemployment Compensation Commission based on wages payable to approximately 214,000 employees. We can not state how many of these employers became liable by virtue of the common control section of the statute nor can we state how many employees will be protected when unemployed by virtue of current employment with an employer whose liability arose by virtue of the common control section of the statute. It is safe to say, however, that the number is substantial particularly as a result of the decision by the Supreme Judicial Court of Maine sustaining the validity of the section.

The common control section of the statute tempers the sharpness of the statutory classification in terms of the employment of eight or more individuals so as to render such classification less arbitrary and to avoid discrimination. The result of the application of the common control section of the statute produces similar treatment of all businesses and enterprises in the same category. It avoids the unfair situation, both as to the competitive basis of the employers and the treatment of working men alike which would result if one employer found it feasible to so divide his functions as to employ less than eight in his respective functions and thereby avoid liability.

In view of the decision of the Supreme Judicial Court of Maine, cited above, and the decision of the Supreme Court of Indiana in this case and the recent decision of the Georgia Supreme Court in the case of Independent Gasoline Company vs. Bureau of Unemployment Compensation of Georgia 10, S. E. 2nd, 58 a serious enforcement problem has been raised in this State. Employers who operate separate establishments under a common control seek to avoid liability in the face of the Maine decision by the argument that the facts in the Georgia and Indiana cases are more analogous to their situation than are the facts in the decision of the Maine Supreme Court. The application of the Maine decision is being unnecessarily restricted and enforcement on an equitable basis is becoming confused.

The administration is consequently charged with the extremely difficult problem of attempting to clarify the application of the common control section of its State Law in the light of the decision in its own State and in the light of the Indiana and Georgia decisions.

The State of Maine, therefore, by and through its duly

appointed and qualified Attorney General, respectfully prays that this court may take jurisdiction of the above entitled matter so that an authoritative and final determination may be reached.

FRANK I. COWAN
Attorney General of the State of Maine

JOHN S. S. FESSENDEN
Assistant Attorney General

RALPH W. FARRIS

Attorneys for State of Maine and Maine Unemployment Compensation Commission

FILED
FEB 21 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,
PETITIONER,

vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,
RESPONDENT.

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA AMICUS CURIAE

ABRAM P. STAPLES,
Attorney General of Virginia.

KENNETH C. PATTY,
Assistant Attorney General of Virginia.

Supreme Court of the United States

October Term, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,
PETITIONER,

vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,
RESPONDENT.

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA AMICUS CURIAE

The Unemployment Compensation Commission of Virginia, by the Attorney General of Virginia, pursuant to the rules of this Court, files this brief, as *amicus curiae*, in support of the petition of The Indiana Unemployment Compensation Board for a writ of *certiorari* in this case.

The Unemployment Compensation Commission of Virginia is interested in this case because the Virginia unemployment compensation law contains provisions[1] similar to Sections 2(g)(1) and 2(g)(4) of the Indiana statute involved in this suit. Since this Court declined to review the recent Georgia case of *Independent Gasoline Company* v. *Bureau of Unemployment Compensation of Georgia.* ..... Ga. ....., 10 S. E. (2d) 58, Cert. den. 61 S. Ct. 175, a number of employing units in Virginia, against which the payroll tax on wages had been assessed by the Virginia Commission under Section 2(i)(4) (quoted in the margin) have refused to con-

---

[1]The Virginia statutory provisions referred to are as follows:

" 'Employer' means:

2 (i) (1): Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals, irrespective of whether the same individuals are or were employed in each such day.

2 (i) (4): Any employing unit which together with one or more other employing units, is owned or controlled, by legally enforcible means or otherwise, directly or indirectly by the same interests, or which owns or controls one or more other employing units, by legally enforcible means or otherwise, and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection." (Michie Virginia Code, 1940 Cumulative Supplement, Section 1887 (94) 2 (i) (1) and 2 (i) (4), Acts 1936, Extra Session, ch. 1, amended Acts 1938, ch. 446, amended Acts 1940, ch. 333.)

tinue the payment of such assessments on the ground that said section violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. This stand of such employing units has been encouraged by the recent decision of the Supreme Court of Indiana here involved. As we interpret the Indiana Court's opinion, it, unlike the opinion in the Georgia case, rests solely on the conclusion that plaintiff's (respondent in this case) Federal constitutional rights would be violated by an enforcement of said provisions. A final adjudication of the question by this Court is obviously necessary to a proper administration, not only of the Virginia statute, but of similar statutes of more than thirty other States, as pointed out in the petition filed by the State of Indiana.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia.

KENNETH C. PATTY,
Assistant Attorney General of Virginia.